Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6290

GLEN D. DUPRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

David L. Bergren
P.O. Box 7
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Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * * \

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE EIGHTH CIRCUIT

The petitioner, Glen D. Dupris, by and through counsel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which reversed the dismissal of the case by the United States District Court for the District of South Dakota.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 612 F.2d 319 and is set forth in Appendix A, infra. The opinion of the District Court is reported at 453 F. Supp. 1171 and is set forth in Appendix B, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on November 27, 1979. By order dated December 3, 1979, the time for filing a petition for rehearing was extended until December 21, 1979, and a timely petition for rehearing was filed on December 20, 1979. The petition for rehearing was dismissed with prejudice on January 18, 1980, and the petitioner's subsequent motion to vacate the dismissal order was denied on February 11, 1980.[1/] By order of this Court dated February 21, 1980, the time for filing a petition for writ of certiorari was extended until March 20, 1980, without prejudice to the Court's consideration of whether the application had been timely filed.[2/] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the Act of May 29, 1908, 35 Stat. 460, had the effect of disestablishing that portion of the Cheyenne River Indian Reservation which was opened to non-Indian settlement under the Act.

1/ The circumstances surrounding this sequence of events are set forth in the petitioner's Application for Extension of Time within Which to File a Petition for Certiorari, No. A-701, filed February 19, 1980. On March 17, 1980, following an evidentiary hearing, the District Court ruled, inter alia, that the document which resulted in the dismissal of the petition for rehearing was the product of undue interference by outside parties with the rights of the accused, and did not represent a voluntary waiver by the petitioner of his right to raise the jurisdictional defenses presented herein. The dismissal of the petition for rehearing therefore appears to have been erroneous.

2/ It is the position of the petitioner that the time for filing this petition was suspended by the timely filing of a petition for rehearing in the Court of Appeals, and that the time for filing began to run no earlier than January 18, 1980, the date when the petition for rehearing was dismissed. See, e.g., United States v. Healy, 376 U.S. 75, 78 (1964); Leishman v. Associated Electric Co., 318 U.S. 203, 205 (1943); Gypsy Oil Co. v. Escoe, 275 U.S. 498 (1927); Morse v. United States, 270 U.S. 151, 153-54 (1926). Therefore, under Rule 34(20) of this Court, the application for extension of time, which set forth the extraordinary circumstances involved, was timely because it was filed within the initial period established for the filing of the petition for certiorari. See Rules 22(2) and 34(1).

STATUTE INVOLVED

The statute primarily involved is the Act of May 29, 1908, 35 Stat. 460, as amended by the Act of February 17, 1910, 36 Stat. 196. Both Acts are set forth in Appendix C, infra.

STATEMENT OF THE CASE

This case is a criminal prosecution arising from the alleged commission of burglary and larceny by the petitioner, a juvenile enrolled member of the Cheyenne River Sioux Tribe, in the city of Eagle Butte, South Dakota. The retail establishment in which the alleged crimes occurred is located on fee patented land in that portion of the historic Cheyenne River Indian Reservation, as established by the Act of March 2, 1889, 25 Stat. 888, which was opened to non-Indian settlement pursuant to the Act of May 29, 1908, 35 Stat. 460, and the Presidential Proclamation of August 19, 1909.[3/] On June 1, 1977, the United States filed an information charging the petitioner with two violations of the Major Crimes Act, 18 U.S.C. § 1153. The information stated that the alleged crimes took place within the boundaries of the Cheyenne River Reservation, and were therefore subject to federal jurisdiction under the Major Crimes Act.

The petitioner moved to dismiss the prosecution for lack of jurisdiction on the grounds that the 1908 Act disestablished the affected portion of the reservation and the situs of the alleged crime was therefore not "Indian Country" as defined by 18 U.S.C. § 1151. Following an evidentiary hearing and the submission of briefs, the District Court in June 1978 granted the motion to dismiss and issued a comprehensive opinion which concluded that the effect of the 1908 Act was to disestablish the Cheyenne River Reservation. United States v. A Juvenile, 453 F. Supp. 1171 (D.S.D. 1978).

3/ The 1908 Act opened portions of both the Cheyenne River Indian Reservation in South Dakota and the Standing Rock Indian Reservation in North Dakota and South Dakota.

The District Court decision was appealed by the United States to the Eighth Circuit Court of Appeals which, in November 1979, reversed the District Court over a vigorous and scholarly dissent by Judge McMillian. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979). The petitioner's petition for rehearing was dismissed with prejudice, and the petitioner here seeks review of the decision of the Court of Appeals.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The decision of the Court of Appeals directly conflicts with the most recent decisions of this Court governing the resolution of the question presented in the instant case. The decision below not only disregards the holdings of these cases, but fails to use the methodical analysis mandated therein.

During the past five years this Court has twice addressed the question of the disestablishment of Indian reservations, or portions thereof, by acts of Congress. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975). These cases set forth in detail the proper analytical approach to be used in the resolution of such questions, which consists of an examination of the following factors: the face of the act, the legislative history and surrounding circumstances, and the subsequent jurisdictional history. See Rosebud, supra at 607-08; DeCoteau, supra at 442, 444. While the opinion of the Court of Appeals noted some of these factors, it does not thoroughly examine the evidence which was presented to the District Court. Furthermore, instead of weighing the cumulative effect of all the evidence, the Court of Appeals discussed each point raised by the dissent separately, and after finding no single argument by itself dispositive, erroneously concluded that no showing of congressional intent to disestablish had been made.

In so doing, the Court of Appeals failed to use the analysis mandated by this Court, and instead reaffirmed its earlier decision in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), which had held that the Act in question did not have the effect of disestablishment. The Condon decision predated both DeCoteau and Rosebud, and therefore must be reexamined in light of this Court's decision in the latter cases. See Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 173 n.11 (1977).

It is well settled that the intent of Congress controls the determination of questions of disestablishment of Indian reservations or portions thereof. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977); DeCoteau v. District County Court, 420 U.S. 425, 442, 444 (1975). By disregarding clear expressions congressional intent, the decision of the court below is in direct conflict with the mandates of this Court. Moreover, the decision below ignores the specific rulings of this Court in cases involving similar statutes and similar circumstances.

Contrary to the court's conclusion below, 612 F.2d at 321, Slip Op. at 5, a congressional intent to terminate the reservation status of the lands affected by the 1908 Cheyenne River Act is discernible from the face of the Act. For example, it is important to note that Section 2 of the 1908 Cheyenne River Act expressly referred to the unopened lands as "the reservation thus diminished." (emphasis added). To refer to a reservation as "diminished" can only mean that its boundaries have been reduced and the outlying portion disestablished. See United States ex rel. Cook v. Parkinson, 525 F.2d 120, 122 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). See also Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 611, 613 (1977).

Furthermore, Section 9 of the Act gave timber rights to Indians residing in certain townships "as long as the lands remain part of the public domain." (emphasis added). The restoration of lands to the public domain is synonymous with disestablishment. See Rosebud, supra at 589 n.5; DeCoteau v. District County Court, 420 U.S. 425, 426-27, 446, 448-49 (1975); Seymour v. Superintendent, 368 U.S. 351, 355 (1962).

Moreover, Section 7 of the 1908 Act reserves from settlement Sections 16 and 36 of each township in the opened area and grants them to the States in which they are located "for the use of the common schools." The significance of this provision was thoroughly explored by the District Court. United States v. A Juvenile, 453 F. Supp. 1171, 1194. As explained in the District Court's opinion, and by this Court in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 599-601 (1977), under the Enabling Act by which South Dakota and North Dakota were admitted into the Union, § 10, 25 Stat. 676 (1889), Sections 16 and 36 of each township were granted to the States as school lands. However, lands within military or Indian reservations were excluded from this grant "until the reservation shall have been extinguished and such lands be restored to ... the public domain." As this Court explained in Rosebud, the reasonable conclusion to be drawn from such a provision is that Congress contemplated a disestablishment of the reservation and made the school grants provided for in § 10 of the Enabling Act. This conclusion is directly supported by the legislative history relied on by the District Court. 453 F. Supp. at 1192. Although the Court of Appeals minimized the importance of this argument, 612 F.2d at 322, Slip Op. at 8, the significance placed on the equivalent school lands section discussed in Rosebud indicates that the argument carries substantial weight.

Finally, § 8 of the 1908 Act, as amended in 1910, forbade the introduction of intoxicating beverages into the area opened by the Act. Act of February 17, 1910, 36 Stat. 196. As noted by both the District Court, 453 F. Supp. at 1198, and Judge McMillian in his dissent from the Eighth Circuit decision, 612 F.2d at 334, Slip Op. at 36, the provision is wholly superfluous if the opened lands were not disestablished, for the introduction of intoxicants was already outlawed on reservations by the Act of July 23, 1892, 27 Stat. 260. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 613-15 (1977). The court below dismissed this argument by accepting the argument of the United States that because the Indians allegedly requested that liquor be banned throughout the reservation, the amended § 8 is merely an enactment of that request. This argument, however, ignores the language of § 8 which specifically refers to the land opened by the 1908 Act, and fails to note this Court's interpretation of an identical provision in Rosebud, supra at 613-15.

Any ambiguity which may be thought to exist in the meaning of the provisions of the 1908 Cheyenne River Act can be resolved by reference to the legislative history and the circumstances surrounding the passage of the Act. A close examination of these factors serves only to bolster the conclusion that the underlying purpose of the Act was disestablishment.

For example, the Senate Report refers to the area left unopened by the Act as "the reservations as diminished." S. Rep. No. 439, 60th Cong., 1st Sess. at 4 (1908). In addition, the account of Inspector McLaughlin's consultations with the Indians and the correspondence of the Department of the Interior, attached to the Senate Report as a supplemental report, is replete with references to cession and relinquishment

of lands, to new boundaries, and to diminished reservations. See S. Rep. No. 439, Part 2, 60th Cong., 1st Sess., passim (1908). As the District Court aptly noted, the fact that these materials were expressly made a part of the Report shows that "the Senate Committee carried forth into the Senate itself the records that contain the operating assumption upon which the correspondence and discussions were based -- namely, that passage of the ... bill would alter the boundaries of the Cheyenne River Reservation ..." United States v. A Juvenile, 453 F. Supp. 1171, 1185 (D.S.D. 1978).

More persuasive, perhaps, is the fact that the 1908 Act here in dispute was only one segment of a unified scheme of legislation enacting the then prevailing federal Indian policy in the Dakotas. As Judge McMillian points out in his dissent below, this statute is one of several nearly identical bills passed between 1904 and 1910 which opened a number of reservations to settlement. 612 F.2d at 326-28, Slip Op. at 16-22. Two of these were the 1907 and 1910 Rosebud Acts which were held to have the effect of disestablishment by this Court in Rosebud, and another was the 1910 Pine Ridge Act held to have the same effect by the Eighth Circuit in United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). See Act of April 23, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 27, 1910, 36 Stat. 440; Act of May 30, 1910, 36 Stat. 448. The striking similarity of language between the relevant portions of these acts and the 1908 Cheyenne River Act cannot be overemphasized.[4/] Another statute, the 1904 Rosebud Act,

4/ The text of the 1907 and 1910 Rosebud Acts is appended hereto in Appendix D for comparison.

used somewhat different language but, as this Court has stated, was passed with precisely the same intent as the later Rosebud Acts. 430 U.S. at 609, 614-15. These surplus land bills were nearly all introduced by the same legislators, and the negotiations were all conducted by the same federal official, Inspector McLaughlin. See 612 F.2d at 326, Slip Op. at 17 (McMillian, J., dissenting).

Finally, the court below found the subsequent jurisdictional history of the area involved in this case to be inconclusive. It should be noted that the jurisdictional history in Rosebud was itself not entirely clear. 430 U.S. at 603. However, the evidence does indicate that the State exercised jurisdiction over the area for several decades without interruption prior to the decision in Condon in 1972. United States v. A Juvenile, 453 F. Supp. 1171, 1199-1200 (D.S.D. 1978). In any event, as the District Court held, the arguments that were advanced by the United States are not persuasive and do not compel a finding that the reservation was not diminished.

The evidence before the courts below leave no room for doubt as to the effect of the 1908 Cheyenne River Act. Like the other strikingly similar statutes enacted during the same decade, the Act opened a portion of the affected reservation to settlement and removed that portion from reservation status. The Court of Appeals unnecessarily discounted this evidence and did not adequately explain its reversal of the comprehensive and scholarly treatment of the available material by the District Court. More importantly, the Court of Appeals failed to explain its divergence from the recent decisions of this Court. A proper examination of the relevant evidence leads to the unmistakable conclusion that the Act here in issue cannot be distinguished from those considered by this Court

in Rosebud, and that, as in Rosebud, the intent of Congress was to disestablish that portion of the original reservation opened by the Act. Therefore, the decision of the court below is in direct conflict with this Court's decision in Rosebud, and, if allowed to stand, will seriously undermine the principles stated by this Court.

II. THE JURISDICTIONAL ISSUES PRESENTED BY THIS CASE ARE OF BROAD IMPORTANCE.

The resolution of the issues presented in this case will extend beyond the exercise of federal jurisdiction over the petitioner and will significantly affect the exercise of jurisdiction by state, county, federal, and tribal governments in the area involved, which includes large portions of several counties of South Dakota and North Dakota. The importance of this case to the affected States and Counties is reflected in their active participation in the litigation below.[5/] In addition, the State of South Dakota and counsel for the affected Counties, both of whom participated in the Rosebud and DeCoteau litigation before this Court, have advised counsel for petitioner that they will file amicus briefs in support of this petition.

5/ The Counties of Dewey, Ziebach, and Corson, South Dakota, and the County of Sioux, North Dakota, submitted extensive briefs in both the District Court and the Court of Appeals and joined in the petition for rehearing filed in the Court of Appeals. The States of South Dakota, North Dakota, and Minnesota joined in the petitioner's suggestions that the hearing and rehearing in the Court of Appeals be held en banc.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The matter should be scheduled for argument on the merits, or, in the alternative, be remanded to the Court of Appeals for further consideration in light of DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). See Appawora v. Brough, 431 U.S. 901 (1977).

Respectfully submitted,

/s/

David L. Bergren
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Fort Pierre, South Dakota 57532

Attorney for Petitioner

AFFIDAVIT OF SERVICE

I hereby certify that a copy of the foregoing was served by first-class United States Mail, postage prepaid, this 20th day of March, 1980, upon the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530.

/s/

William W. Shakely

Subscribed and sworn to before me this 20th day of March, 1980.

/s/

Notary Public

Supreme Court, U.S.
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MAY 29 PAGE 7

IN THE

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UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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IN THE

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October Term, 1979

No. 79-6290

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

The purpose of this brief, which is filed pursuant to Rule 24(5) of the Rules of this Court, is to bring to the attention of the Court certain events which have transpired since the filing of the Petition for Writ of Certiorari on March 30, 1980.

On March 24, 1980, the petitioner filed a Second Petition for Rehearing with the Court of Appeals, incorporating by reference the contents of the original Petition for Rehearing which had been dismissed on January 18, 1980, and suggesting that the case be reheard en banc.[1/] On April 14, 1980, the Court of Appeals issued an order (1) recalling the previous mandate in the case, (2) vacating its dismissal of the original Petition for Rehearing, and (3) denying the Second Petition for Rehearing on the merits, over the negative vote of Judge McMillian. The mandate of the Court of Appeals was issued on April 22, 1980.

Because of the unusual circumstances involved in the disposition of the petitioner's attempts to seek a rehearing below, a more complete explanation of this sequence of events may be helpful to the Court. The initial Petition for Rehearing with Suggestion that Rehearing be En Banc was filed by the petitioner on December 20, 1979, following the grant of an extension of time. On December 28, 1979, counsel for the Cheyenne River Sioux Tribe, which acted as amicus curiae in the proceedings below, forwarded to the Court of Appeals copies of letters addressed to counsel for the petitioner and purportedly from the petitioner and his sister, which indicated a reluctance on the part of the petitioner to proceed further in his appeal efforts.[2/] A copy of the petitioner's correspondence was also forwarded to the Court of Appeals by the Department of Justice on January 2, 1980. Subsequently, on January 18, 1980, the Court of Appeals, apparently treating the correspondence described above as an "application of the appellee acting pro se", dismissed the Petition for Rehearing with prejudice. The petitioner's Motion to Vacate the Dismissal Order was denied on February 11, 1980.

Following these proceedings, the petitioner requested a hearing in the District Court to determine certain questions relating to the circumstances surrounding the preparation of the correspondence which resulted in the dismissal of his Petition for Rehearing. This hearing was held on March 17, 1980.

1/ A copy of this petition was sent to this Court by counsel for petitioner on March 25, 1980. A copy is also attached hereto as Appendix A.

2/ Copies of these and other relevant documents are attached to the Second Petition for Rehearing which is appended hereto as Appendix A.

By order dated March 20, 1980, the District Court found, inter alia, that certain administrative officials of the Cheyenne River Sioux Tribe had requested that the petitioner, who is a juvenile, discontinue his appeal efforts, that the letter in question had been prepared by others for petitioner's signature, and that the petitioner believed that his physical safety would be endangered if he did not discontinue his appeal efforts. The court consequently held that the petitioner's rights had been interfered with and that his signing of the letter in question had not been voluntary. On the basis of these determinations, the petitioner filed the Second Petition for Rehearing referred to above, which was denied on April 14, 1980.

Respectfully submitted,

David L. Bergren by DWS

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AFFIDAVIT OF SERVICE

I hereby certify that the foregoing Supplemental Brief of Petitioner was served this 19th day of May, 1980, by United States Mail, first-class postage prepaid, addressed to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

William W. Shakely

Subscribed and sworn to before me this 19th day of May, 1980.

Notary Public

My Commission Expires June 30, 1985

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1575

UNITED STATES OF AMERICA,

Appellant,

v.

GLEN D. DUPRIS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
HONORABLE ANDREW W. BOGUE

SECOND
PETITION FOR REHEARING WITH SUGGESTION
THAT REHEARING BE EN BANC

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1575

UNITED STATES OF AMERICA,

Appellant,

v.

GLEN D. DUPRIS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
HONORABLE ANDREW W. BOGUE

SECOND
PETITION FOR REHEARING WITH SUGGESTION
THAT REHEARING BE EN BANC

The Appellee, Glen D. Dupris, respectfully petitions this Court to grant a rehearing with respect to its decision of November 27, 1979, in the instant case, and to withdraw its order of January 18, 1980, dismissing appellee's first petition for rehearing with prejudice. With respect to the petition for rehearing on the decision of November 17, 1979, appellee hereby incorporates by reference all of the arguments and authorities cited in the first petition for rehearing and respectfully requests the Court to review the first petition in that regard.

With respect to the order of January 18, 1980, acting upon a purported application of the appellee, pro se, appellee urges that based upon the new evidence presented herein, Glen Dupris does not wish the appeal dismissed, and requests that this Court continue with its consideration of the matter. As foundation for appellee's contention, reference is made to the affidavit of Lyle Dupris, father of Glen D. Dupris, a juvenile, and the affidavit of Glen D. Dupris; both affidavits filed of record in the Office of the Clerk for the District of South Dakota, Central Division, and to the Findings of Fact, Conclusions of Law, and Order that was entered by the Court subsequent to a hearing on motion of the defendant, a copy of which motion and supporting affidavits is also appended hereto and incorporated herein by reference.

ARGUMENT

THE PURPORTED APPLICATION FOR DISMISSAL OF THE APPEAL BY JUVENILE GLEN D. DUPRIS ACTING PRO SE DID NOT REPRESENT THE DESIRES AND WISHES OF THE APPELLEE.

The record in the lower court established at the time of the hearing that appellee and his father were informed by one Mike Claymore that the Tribe did not wish his appeal continued. This was done upon summoning the boy and his father to the tribal administration building and the conference was held in Mr. Claymore's office. Further, peer group pressure was also apparent in a statement made by defendant on the stand that he might be "snuffed" or shot in the head for proceeding with his appeal. Testimony at the hearing also indicated his sister and others had encouraged him to dismiss the appeal, partly because they did not understand the

posture of the case with respect to defendant's exposure to conviction if the appeal failed. Finally, Junior Provo, tribal member and a part of the trial administration, typed the letter dated December 12, 1979, and addressed to David L. Bergren, appellee's court-appointed counsel, and told the defendant to sign it and have his father sign it. Both the defendant and his parents stated that the letter did not express their wishes and that the defendant wished his case to be continued. The trial court also found that the defendant did not have the legal capacity to file pleadings, and that his purported actions were not free, voluntary, or intelligently done. The Court found that other persons had interfered with the rights of defendant.

CONCLUSION

The Court's order of January 18, 1980, dismissing the petition for rehearing with prejudice should be withdrawn and reconsidered on the basis of the new evidence showing that the purported application of the appellee, pro se, was not in fact the free, voluntary, and intelligent act of the defendant, but was in fact, the result of duress and interference with appellee's statutory and constitutional rights. The petition for rehearing should be granted for all of the reasons and arguments set forth in appellee's first

petition for rehearing, filed of record herein.

Dated this 19th day of March, 1980.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David L. Bergren, hereby certify that a copy of the foregoing Second Petition for Rehearing with Suggestion That Rehearing be En Banc was mialed, first-class postage prepaid, to the following counsel of record, on this 21st day of March, 1980:

Terry L. Pechota, Esquire
United States Attorney
231 Federal Building
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Carl Strass, Esquire
Attorney, Appellate Section
Land and Natural Resources Division
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David L. Bergren
David L. Bergren
Attorney for Appellee

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA, Plaintiff,	)	CR 77-30056-01
-vs-	)	MOTION
GLEN D. DUPRIS, Defendant.	)	

* *

Comes now Defendant, Glen D. Dupris, by and through his attorney, David L. Bergren, and moves the Court prior to trial for a determination of the following issues:

1. Whether the purported dismissal of the appeal herein was the free, voluntary and intelligent act of the Defendant herein.

2. Whether the Defendant herein has the legal capacity to file binding pleadings in this matter.

3. Whether or not other parties or individuals interferred with the rights of this juvenile defendant.

4. Whether or not present counsel should continue as attorney for Defendant in this matter. —

Dated this 10th day of March, 1980.

/s/ David L. Bergren
David L. Bergren
Attorney for Defendant
P. O. Box 7
Fort Pierre, South Dakota 57532

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA, Plaintiff,	)	CR 77-30056-01
-vs-	)	AFFIDAVIT
GLEN D. DUPRIS, Defendant.	)	

* *

State of South Dakota)
: ss.
County of Stanley)

Comes now your affiant, David L. Bergren, and states to the Court:

That he is the attorney for Defendant herein, who is a juvenile charged with a burglary on the Cheyenne River Reservation;

That by way of motion, Defendant moved to dismiss the action for lack of jurisdiction, which motion was granted by Judge Bogue;

That the matter was appealed by the government, and the Eighth Circuit by decision filed of record November 27, 1979, Judge Bogue was reversed and the matter remanded. Preliminary to appealing the matter to the Supreme Court, Defendant requested a rehearing. The Petition was denied with prejudice, based upon the correspondence of the Defendant, copies of which are attached hereto and made a part hereof by reference. Copies of correspondence by unrelated counsel are also included as exhibits.

Your affiant as trial counsel/believes that as a juvenile the Defendant herein has been unduly influenced by others with respect to his position. Affiant's last personal contact with the Defendant revealed that he wished to avail himself of all possible legal defenses. I do not believe that Defendant is legally able to bind himself with respect to his position, and feel that if this matter is tried and the Defendant decides that he wishes to challenge jurisdiction again, another round of litigation will result. Affiant further feels that persons not connected with the Court have attempted to influence the Defendant with respect to his provision solely because the Cheyenne River Sioux Tribe stands

to lose a large number of acres from the Reservation if jurisdiction is not upheld;

Affiant believes that these people talked to the Defendant, without presence of court-appointed counsel, and that such interferrence is in contempt of this Court;

Finally, present counsel for Defendant is convinced that the jurisdiction argument is meritorious, in that the Defendant is being unfairly taken advantage of by persons wishing to protect the Tribe's interest in this matter of jurisdiction. That for this reason, Affiant believes that before any further proceedings are had, the Court grant a hearing for full inquiry into the validity of the purported actions of the Defendant and desires with respect to present defense counsel and for such further determinations as the Court deems necessary to insure an orderly and just proceeding.

Dated this 10th day of March, 1980.

/s/ David L. Bergren
David L. Bergren
Attorney for Defendant
P. O. Box 7
Fort Pierre, SD 57532

Subscribed and sworn to before me this 10th day of March, 1980.

/s/ Karen K. Gertonson
My Commission Expires: 7/30/82 Karen K. Gertonson, Notary Public

(SEAL)

BERGREN AND DUFFY
Attorneys at Law
P.O. Box 7
FT. PIERRE, S. D. 57532

January 21, 1980

Robert D. St. Vrain, Clerk
U.S. Court of Appeals for
the Eighth Circuit
St. Louis, MO 63101

RE: U.S. vs. Glen D. Dupris
No. 78-1575

Dear Mr. St. Vrain:

This will acknowledge receipt of a notification dated January 18, 1980, that the petition for rehearing in the above matter is dismissed with prejudice, upon application of the appelle acting pro se. I have several questions in this regard and would ask you for clarification.

First of all, I am enclosing the sole correspondence with respect to this matter. I am also enclosing my response to Mr. Dupris. As you can see, the letter of December 10th indicates a belief that the young boy has already been sentenced by the Federal Court. I am afraid there has been a great deal of pressure brought to bear by the Tribe or other persons, as the young man has never personally indicated to me anything that a desire to defend himself as best he is able.

I wish to know whether the Court has discharged me as attorney for Glen Dupris. If so, I would like the reasons to be stated of record. I think it is only fair to me that the record reflect the "cause" for which I was fired. Secondly, it is my understanding that I still represent the boy at the trial-court level, and we will now proceed to trial on the merits. Am I precluded from any further appeal proceedings with respect to this defendant?

I believe the thing that bothers me most about the handling of this matter is that I feel there are interests here, particularly the Tribes, which are contrary to what might be in the best interest of this young man, let alone what the young man might personally feel. I am surprised that the correspondence was accepted as an application for dismissal, without even assertaining the validity of signatures, let alone the personal feelings of defendant. Certainly, the question of jurisdiction is a legitimate question which I felt ethically bound to raise. I feel that under the circumstances there should have been inquiry into the bona fides

of the correspondence I received. Also, I am wondering if I am discharged from any responsibility from determining whether the Tribe's actions in this matter might constitute a violation of the juvenile's rights, for instance under 46 U.S.C. 1983.

I have tried to act in the best interests of Mr. Dupris throughout this matter, and I would therefore appreciate a clarification from the Court as to exactly what my status is and where my responsiblities end.

Thank you for your kind cooperation.

Very truly yours,

DAVID L. BERGREN

DLB/kkg

cc: The Honorable Andrew W. Bogue

BERGREN AND DUFFY
Attorneys at Law
P.O. Box 7
FT. PIERRE, S. D. 57532

December 21, 1979

Mr. Glen D. Dupris
Box 121
Eagle Butte, SD 57625

RE: U.S. vs. Dupris
Our File No. 5524

Dear Glen:

This will acknowledge receipt of your letter of December 12, 1979. Please be advised that any actions that have been taken with respect to your case have involved matters of law pertaining to your defense. Please also be advised that I was appointed by Judge Bogue to represent you in this matter and I am following my duty in that regard. There is a significant issue to be resolved as to the jurisdiction of the Court.

If you do not feel that I am properly representing you in this matter, I would suggest that you convey that communication to Judge Bogue. I presume he will take any steps he feels necessary in this matter.

Very truly yours,

DAVID L. BERGREN

DLB/deh

cc: Judge Bogue
Lyle Dupris

December 10, 1979

Mr. Dave Bergman, Counselor
Post Office Box 7
Fort Pierre, South Dakota 57532

RE: United States of America vs. Glenn Dupris

Dear Mr. Bergman:

This is in reference to the above entitled case. I have discussed this case at length with my brother, Glenn Dupris and my parents. I have advised them that you have misrepresented Glenn in trying to have this case heard within the jurisdiction of the State of South Dakota. This you have pursued after Glenn had received a fair sentence from the Federal Court of South Dakota.

Therefore, Mr. Bergman, on behalf of my brother Glenn and my parents we feel that your services are no longer effective, nor are they desired. If Glenn's case is to proceed we shall find other counsel.

Please forward pertinent information to Glenn Dupris and my parents. Thank you.

Sincerely,

Brenda Lee

cc: Judge Bogg
Melvin Garreau, Tribal Chairman
Cheyenne River Sioux Tribe

December 12, 1979

Mr. David L. Bergren
Bergren & Duffy
P.O. Box 7
Fort Pierre, S.D. 57532

Dear Mr. Bergren:

I received a copy of your letter dated November 29, 1979 to the clerk of the United States Court of appeals requesting an extension of ten days in which to file a Petition for Rehearing on my Case (U.S. Vs. Glen D. Dupris #78-1575). After careful thought on my part, I have decided to take the following course of action:

1. There will be no review or rehearing at any level of the present Appeals' Court decision on my Case.
2. I don't want the State of South Dakota to have any involvement in my Case.
3. If you are unwilling to follow this course then I will seek the counsel of another lawyer.

Thank you for your help.

Sincerely,

Glen Dupris
Glen D. Dupris
Eagle Butte, South Dakota 57625

Concur:

Lyle Dupris (Father)

C.C: Chairman-Cheyenne River Sioux Tribe

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

January 2, 1980

PRS
90-6-5-5

Mr. Robert St. Vrain
Clerk
United States Court of Appeals
Eighth Circuit
1114 Market Street
St. Louis, Missouri 63101

Dear Mr. St. Vrain:

Re: United States v. Glen Dupris,
No. 78-1575

On November 27, 1979, the Court of Appeals issued its decision in the above-entitled case. Counsel for Glen D. Dupris then mailed a petition for rehearing in this case to the Court on December 20, 1979.

Although the Federal Rules of Appellate Procedure do not permit a response to a petition for rehearing unless one is requested, the following may be of interest to the Court in determining whether that petition is properly filed. Enclosed is a copy of a letter from the appellee, Glen D. Dupris, to his attorney, dated December 12, 1979, in which Mr. Dupris has apparently instructed his attorney not to file a petition for rehearing in this case.

Earlier this week, Mr. Dupris' counsel, David L. Bergren, and I discussed this matter. Mr. Bergren informed me that since he had been appointed to represent Mr. Dupris by the federal district court, it was his view that only the federal district court could discharge him from his obligation. Accordingly, he very properly provided a copy of the letter from Mr. Dupris to the Honorable Andrew Bogue, Judge, United States District Court for the District of South Dakota.

It may be that Judge Bogue now has this matter under consideration; however, it is also possible that the matter is being held in abeyance pending some decision by this Court. Accordingly, I would respectfully suggest that the

appellate panel in this case may wish to examine the correspondence between Mr. Dupris and his counsel before taking any action on the petition for rehearing.

Thank you very much.

Sincerely,

Peter R. Steenland, Jr.
Chief, Appellate Section
Land and Natural Resources Division

cc: Honorable Andrew Bogue
United States District Judge
District of South Dakota
Federal Building and U.S. Courthouse
515 Ninth Street
Rapid City, South Dakota 57701

David L. Bergren, Esquire
Bergren & Duffy
Post Office Box 7
Fort Pierre, South Dakota 57532

Tom D. Tobin, Esquire
422 Main Street
Winner, South Dakota 57580

William W. Shakely, Esquire
Tobin Law Offices
Suite 607
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Richard West, Jr., Esquire
Suite 1000, Watergate 600
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

December 12, 1979

Mr. David L. Bergren
Bergren & Duffy
P.O. Box 7
Fort Pierre, S.D. 57532

Dear Mr. Bergren:

I received a copy of your letter dated November 29, 1979 to the clerk of the United States Court of appeals requesting an extension of ten days in which to file a Petition for Rehearing on my Case (U.S. Vs. Glen D. Dupris #78-1575). After careful thought on my part, I have decided to take the following course of action:

1. There will be no review or rehearing at any level of the present Appeals' Court decision on my Case.

2. I don't want the State of South Dakota to have any involvement in my Case.

3. If you are unwilling to follow this course then I will seek the counsel of another lawyer.

Thank you for your help.

Sincerely,

Glen D. Dupris
Eagle Butte, South Dakota 57625

Concur:

Lyle Dupris (Father)

C.C: Chairman-Cheyenne River Sioux Tribe

BERGREN AND DUFFY
Attorneys at Law
P.O. Box 7
FT. PIERRE, S. D. 57532

January 3, 1980

The Honorable Andrew W. Bogue
Federal District Judge
Federal District Court
Federal Building
515 Ninth Street
Rapid City, SD 57701

RE: U.S. v. Dupris
No. 78-1575

Dear Judge Bogue:

Enclosed please find a copy of the letter I received addressed to the Eighth Circuit Court of Appeals. I am generally not bothered by the reactions of other persons who care to express opinions about my representation of my clients. However, it appears that I have a situation where an attorney is suggesting actions taken in defense of my client are "inappropriate" and requesting an investigation. This upsets me greatly, but as I am unsure how to proceed I thought I would at least bring it to your attention.

It is apparent that a great deal of pressure is being brought to bear upon the young boy I represent. He has a valid legal defense to assert on the issue of jurisdiction. I feel it is my duty to assert that defense. I resent the attempted interference into my relationship with my client, as I feel it breaches the integrity of the judicial process. I feel that intimidation of a party defendant certainly should stand on a par with intimidation of witnesses or other obstructive actions. Particularly with respect to a juvenile.

I apologize for burdening you with my comments. I did wish to bring this matter to your attention however.

Very truly yours,

DAVID L. BERGREN

DLB/deh

Encs.

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN
SUITE 1000
600 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20037

(202) 342-3500
CABLE "STERIC WASHINGTON"
TELEX 892406

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON

WRITER'S DIRECT NUMBER IS
342-3627

December 28, 1979

Mr. Robert C. Tucker
Clerk, United States Court of Appeals
for the Eighth Circuit
U.S. Court and Custom House
1114 Market Street
St. Louis, Missouri 63101

Re: United States v. DuPris
No. 78-1575

Dear Mr. Tucker:

Earlier this week I received in the mail a copy of defendant's Petition for Rehearing with Suggestion that Rehearing be En Banc in the above-captioned case. In light of the enclosed copies of correspondence which I had received previously from the Chairman of the Cheyenne River Sioux Tribe, which is our client and an amicus curiae in the DuPris litigation, I was somewhat surprised by the arrival of defendant's Petition.

As you can see, in correspondence dated December 12, 1979, and concurred in by his father, defendant DuPris explicitly directed his attorney not to seek a further review or rehearing in the Eighth Circuit concerning his case. Assuming the authenticity of Mr. DuPris' letter, which I have no occasion to doubt, Mr. Bergren's filing of the Petition is entirely inappropriate. I would respectfully urge, therefore,

that the foregoing be brought to the Court's attention, and that the matter be investigated prior to any action on the Petition.

Sincerely yours,

W. Richard West, Jr.

Enclosure

cc: David L. Bergren
Bergren and Duffy
P.O. Box 7
Fort Pierre, South Dakota 57532

Tom D. Tobin
Tobin Law Offices
422 Main Street
Winner, South Dakota 57580

William W. Shakely
Tobin Law Offices
Suite 607
1150 17th St, NW
Washington, D.C. 20036

Terry L. Pechota, Esquire
United States Attorney
231 Federal Building
400 South Phillips
Sioux Falls, South Dakota 57102

Carl Strass, Esquire
Attorney, Appellate Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Melvin Garreau

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA, Plaintiff,	)	CR 77-30056-01
-vs-	)	O R D E R
GLEN D. DUPRIS, Defendant.	)	

* *

A hearing having been held on March 17, 1980, counsel for the United States and the Defendant being present, and the Court having heard all of the evidence and testimony adduced, and having entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that David L. Bergren, court-appointed attorney for Glen Dupris, continue to represent the Defendant and proceed to pursue all remedies and defenses available to Glen Dupris.

Dated this 20th day of March, 1980.

BY THE COURT:

/s/ Andrew W. Bogue
Andrew W. Bogue, Judge
Federal District Court

ATTEST:

/s/ William J. Srstka
William J. Srstka, Clerk.

BY: _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA, Plaintiff,	)	CR 77-30056-01
-vs-	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
GLEN D. DUPRIS, Defendant.	)	

* *

A hearing having been held on the 17th day of March, 1980, in the Federal Courtroom in Rapid City, South Dakota, Defendant and his parents and court-appointed counsel, David L. Bergren, being present, and Assistant United States Attorney, Shelly Stump, appearing in behalf of the United States of America, and the Court having heard the testimony of the Defendant and his parents and other witnesses, and having read and filed the affidavits and exhibits, and based upon all of the files and records herein, good cause shown therefore, the Court makes the following:

FINDINGS OF FACT

I

That Glen Dupris is a juvenile, presently age 16, and was 13 years of age at the time he was indicted.

II

That the youngster has felt pressure from his peers, tribal members, to the point he feels that his physical safety is endangered by the litigation of the issues connected with his case.

III

That Glen Dupris and his father, Lyle Dupris, were summoned to the tribal office building, to the office of Mike Claymore, where they were informed that the Tribe desired that the youngster stop appealing his case, and that the appeal was not in the best interest of the Tribe. Some suggestion was made at that time about the Tribe furnishing a lawyer for Glen.

IV

That a tribal member associated with tribal government named Junior Provo typed a letter dated December 12, 1979, and addressed to David L. Bergren, Mr. Dupris' attorney; that the letter was not done at the direction of the juvenile, nor was it with his consent; that Junior Provo told Glen Dupris to sign the letter and have his dad sign it; the letter purported to stop or dismiss the progress of the appeal in his case.

V

Because of the pressure, Glen Dupris signed the letter referred to above, and his father signed it because of the request of the juvenile. The father did not understand the letter.

VI

Glen Dupris and his father disavow and disclaim the letter dated December 12, 1979; both desire the appeal to be continued and all defenses possible be asserted in behalf of the juvenile.

VII

That the actions of Junior Provo and other individuals constitute an interference with the rights accorded Glen Dupris under the United States Constitution and laws of the United States.

VIII

That the purported dismissal of the appeal was not a free, voluntary and intelligent act of the Defendant, Glen Dupris.

IX

The Defendant, Glen Dupris, does not have the legal capacity to file binding pleadings in this matter.

X

That David L. Bergren should continue as attorney for the Defendant in this matter and pursue all remedies in his defense.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

I

That the purported dismissal of the appeal herein by Glen Dupris was not a free, voluntary and intelligent act.

II

That the Defendant has not the legal capacity to file binding pleadings in his own behalf.

III

That Junior Provo and other individuals interfered with the rights of this Defendant.

IV

That David L. Bergren should continue as court-appointed attorney for Defendant.

Dated this 20th day of March, 1980.

BY THE COURT:

/s/ Andrew W. Bogue
Andrew W. Bogue, Judge
Federal District Court

ATTEST:

/s/ William J. Srstka
William J. Srstka, Clerk.

BY: _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GLEN D. DUPRIS, Defendant.	) CR 77-30056-01	AFFIDAVIT

State of South Dakota)
: ss.
County of Stanley)

Comes now your affiant Glen Dupris and states and alleges:

That he is Sixteen (16) years old and has been charged by Indictment with commission of a burglary and larceny on the Cheyenne River Indian Reservation;

That David L. Bergren, his court-appointed attorney, made certain motions in his defense challenging the jurisdiction of the Court; That these motions were granted in the Trial Court by Judge Bogue and the Government appealed to the Eighth Circuit Court of Appeals; That during the motions at the Trial Court level and on appeal, the Cheyenne River Sioux Tribe intervened because it had an interest in the question of the jurisdiction over the lands in question;

That after the appeal was taken your affiant and his father, Lyle Dupris, were called to the tribal office of the Cheyenne River Sioux Tribe and there Mike Claymore, a member of the Cheyenne River Sioux Tribe administration had a conference with affiant and his father; That although your affiant does not remember the exact conversation, the import was that Mike Claymore spoke for Melvin Garreau, the tribal chairman, and a Mr. Triosie, the tribal lawyer and he informed affiant and his father that the Tribe did not want the case to go any further; He further said that the Tribe would see to it that another lawyer was furnished to represent affiant and he said that he had discussed the matter with Melvin Garreau, the tribal chairman, and the tribal attorney Triosie;

Further, your affiant was contacted by one Junior Provo who is also in the tribal administration, who also told him that the Tribe did not want him proceeding with his case; Mr. Provo then drafted a letter dated December 12, 1979, and addressed to my lawyer Mr. Bergren, and told me to sign it and to take it home and tell my father to sign it; because of the above pressures, I did as I was told; I signed the document and I took it home and told my father to sign it; he did not understand what it was but he signed it because I asked him to.

At the time that I talked to all of these people, I did not have any advice from my lawyer, and I was led to believe that he was doing me wrong and the Tribe wrong; since I have had the matter explained to me, I now understand that this question is necessary to my defense and I wish to explore every possible defense that I have; For this reason I wish to expressly deny any and all of the statements made in the letter of December 12, 1979, a copy of which is attached to this Affidavit; and further state that I signed it only because I felt I was being pressured to drop the case and I felt there would be bad repercussions in feelings against me if I did not do so.

I wish Mr. Bergren to continue to represent me and to continue to seek to have the question of jurisdiction and all of the other related matters resolved. All of the people who talked to me did so without my invitation or request. I feel that they have interferred in my case and I oppose their actions. I wish to defend myself to the best of my ability with the assistance of Mr. Bergren. I specifically withdraw any request to terminate the appeal process, and ask that the Eighth Circuit Court of Appeals reinstate the appeal because I do not wish my appeal withdrawn; I did not voluntarily choose to withdraw my appeal and I want to continue with my appeal at this time. I disavow anyones actions supposedly taken in my behalf; I am represented only by Mr. Bergren and no one else speaks for me and I have authorized no one to request withdrawal of my appeal. I do not want it dismissed.

Dated this 12th day of March, 1980.

/s/ Glen D. Dupris
Glen D. Dupris

Subscribed and sworn to before me this 12th day of March, 1980

(SEAL)

My Commission Expires: 6-17-84

/s/ David L. Bergren
Notary Public

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

* *

UNITED STATES OF AMERICA, Plaintiff, vs. GLEN D. DUPRIS, Defendant.	)	CR 77-30056-01 AFFIDAVIT

* *

State of South Dakota)
: ss.
County of Stanley)

Comes now your affiant Lyle Dupris and states and alleges:

That he is the father of Glen Dupris and makes this Affidavit at the request of his son and his attorney Mr. Bergren to inform the Court as to the question of continuing with Glen's appeal;

That after Mr. Bergren began representing Glen, Glen and myself were called to the tribal office by Mike Claymore and we had a talk with him there; That the jist of the conversation was that the Tribe did not want the case to go any further and Mr. Claymore said that he had discussed the matter with Melvin Garreau the tribal chairman and Mr. Triosi the tribal attorney; He also implied that the Tribe would furnish a lawyer for Glen; after that, Glen came home with a letter that was typed up by Junior Provo which Glen had signed, and he asked me to sign it too. I signed the letter, but I didn't know what it was, and I did not wish for Glen to stop defending himself.

I do not wish tribal politics to be involved in this case, as I am not a political person; I wish my son to be represented by Mr. Bergren and I believe he is doing what he can to defend my boy; I further believe that my boy should be represented and the matter of the jurisdiction be decided, and I am in agreement that the matter should be handled by the appeals court; I know that Glen was under great pressure to dismiss the case and I am sure that is the reason that he signed the paper December 12, 1979, which was sent to Mr. Bergren; I join with my son in requesting that the appeal be

continued, and I know that my boy has always wanted to have his case defended in the best way possible; I also know that Glen talked to a Mr. Springer, who is a lay tribal lawyer, who also advised him that his case was wrong and that it should be dropped. Glen did not contact Mr. Bergren, and he probably should have done so before signing these papers. We wish Mr. Bergren to continue on the case and to defend Glen.

Dated this 17th day of March, 1980.

/s/ Lyle Dupris
Lyle Dupris

Subscribed and sworn to before me this 17th day of March, 1980.

My Commission Expires: 6-17-84

/s/ David L. Bergren
Notary Public

(SEAL)

APPENDIX A

OPINION OF COURT OF APPEALS
(WITH ERRATA LETTER)

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 78-1575

United States of America, *
*
Appellant, *
* Appeal from the United
v. * States District Court for
* the District of South
Glen D. Dupris * Dakota.
*
Appellee. *

Submitted: December 11, 1978

Filed: November 27, 1979

Before HEANEY, ROSS and McMILLIAN, Circuit Judges.

HEANEY, Circuit Judges.

The United States appeals from the judgment of the District Court[1] dismissing an information against Glen D. Dupris, who was charged with burglary and larceny. Dupris was prosecuted under 18 U.S.C. §1153 which provides exclusive federal jurisdiction over specified offenses committed by any Indian in "Indian country."[2] The District Court granted Dupris' motion to dismiss on the ground that there was no federal jurisdiction pursuant to 18 U.S.C. §1153 because Eagle Butte, where the crime occurred, was not "Indian country." The District Court refused to follow the earlier opinions of this Court in *United States v. Long Elk*, 565 F.2d 1032 (8th Cir. 1977); *United States v. Erickson*, 478 F.2d 684 (8th Cir. 1973)(which involved the

[1]The Honorable Andrew A. Bogue, United States District Judge for the District of South Dakota.

[2]Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery and larceny *within the Indian country*, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. §1153 (emphasis added).

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. §1151.

same portion of the Cheyenne River Indian Reservation as is here in question); and *The City of New Town, North Dakota v. United States*, 454 F.2d 121 (8th Cir. 1972), believing that these opinions had been undermined by *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). It held that, while Eagle Butte was once part of the Cheyenne River Indian Reservation and thus "Indian country," the town lost its reservation status when the portion of the original reservation upon which it sits was opened for settlement in 1908.[3] Because we remain convinced the *Long Elk*, *New Town* and *Erickson* were correctly decided, and that no prior or subsequent decision of the Supreme Court requires us to abandon our position,[4] we reverse and remand.

---

[3]*United States v. Juvenile*, 453 F.Supp. 1171, 1201 (D. S.D. 1978).

For the sake of clarity, we note that the question whether the boundaries of an Indian reservation, as drawn when the reservation was established, are redrawn after part of that reservation has been opened for settlement, has been expressed in several different ways by various courts. The process has been called disestablishment (referring to the disestablishment of the original reservation boundaries); diminishment (referring to a diminishing or shrinking of the original boundaries); termination of reservation status (if the original boundaries are redrawn, the reservation status of the land is no longer within the boundaries and thus is terminated); and a change of boundaries.

[4]Indeed, *United States v. Erickson*, 478 F.2d 684 (8th Cir. 1973), was cited with approval in *Mattz v. Arnett*, 412 U.S. 481, 505 n.23 (1973).

In light of our view that this case is controlled by our earlier opinions, there is no need to again detail the reasoning of those cases here. However, in a thorough and scholarly dissent, Judge McMillian today raises arguments which we must now address.

The issue here in question, like that in our prior cases, is whether a congressional act that opened portions of an Indian reservation terminated Indian jurisdiction over the opened land.[5] In order for the land to lose its status as "Indian country," disestablishment must have been effected. It is now clear that in order to terminate the rights of Indians in land (to effect a disestablishment of a reservation),

> "[a] congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history," Mattz v. Arnett, [412 U.S. 481, 505 (1973)][.]
>
> * * * *
>
> In determining this intent, we are cautioned to follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" McClanahan v.

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[5]We note that the dissent takes a narrow view of the effect of this decision. Our colleague argues that "[a]ccess to federal benefits and programs by Indians living in the opened portion is not affected by our decision." Nevertheless, had the dissenting opinion been adopted, then some Indians may have become subject to state laws and regulations and could possibly have lost some control over the lands and resources with the reservation's boundary.

> Arizona State Tax Comm'n, 411 US 164, 174 (1973); quoting Carpenter v. Shaw, 280 US 363, 367 (1930). The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.

Rosebud Sioux Tribe v. Kneip, supra at 586-587 (additional citations omitted).

Certainly, no congressional determination to terminate is expressed in the statute which opened the land in and around Eagle Butte. We must then decide whether the intent to terminate is clear from the surrounding circumstances and legislative history. The dissent finds the necessary intent from several factors, the first of which is the historical context of the legislation. Our colleague reasons that because (1) South Dakota leaders sought to open Indian lands on all of the state's reservations to settlement with a single-minded ardency, (2) the South Dakota Senators and Congressmen were similarly single-minded in sponsoring all of the bills accomplishing this purpose, and (3) Inspector James McLaughlin conducted negotiations on all the reservations without mention of any reserved jurisdiction for the Indians; therefore, Congress acted with like intent in passing each of the acts. That intent was to diminish the size of South Dakota's Indian reservations.

In light of *Rosebud*, we are unwilling to accept this reasoning. We believe that under the decisions of the Supreme Court, it is inappropriate to ascribe the motives

of the South Dakota leaders and legislators to Congress as a whole, particularly when the acts in question were over the course of several years. While it may be clear that the South Dakotans sought complete control of as much Indian land as possible and that Inspector McLaughlin aided them in achieving this goal, it is not clear that Congress shared this intent in all, or any, cases.

Rosebud requires that we examine each act of Congress carefully and individually to determine whether there was a clear congressional intent to terminate. Here, a congressional intent to diminish Indian land, rather than to merely open it to settlement, is not clear. In fact, the opposite conclusion is as easily reached. The South Dakota boosters talked about an "*opening* of the reservation," dissenting opinion at 20 (emphasis added), not diminishing its boundaries. Further, Inspector McLaughlin told the Indians on the Cheyenne River Reservation that "[i]t will be manifestly better for the Indians to have their surplus lands *opened* to settlement" so that they may "readily acquire white man's civilization and industrious habits[.]" Dissenting opinion at 21 n.11 (emphasis added). These are not clear expressions of a congressional determination to terminate.

The second factor considered by our colleague is the langugage of the statute. While he concedes that "no language of cession" is in the statute, he argues that the historical context in which the act was written makes this omission irrelevant. Although we agree that perhaps too much weight has been given in the past to the use of the word "cede" in these statutes, we are not persuaded that

the term's presence or absence is totally irrelevant.

Nor are we persuaded by our colleague's argument that this statute was the functional equivalent of those statutes which contain language of cession. He bases this argument on his belief that the statute's drafters told Congress (and Inspector McLaughlin told the Indians) that settlement statutes achieved the same result with or without cession language.

The first problem with this argument is that Congressman Charles H. Burke told his colleagues simply that this act was "in line with recent bills which have been passed affecting the sale of Indian reservations," dissenting opinion at 23, which is hardly an unambiguous statement of intent. Second, because Inspector McLaughlin's statements were made to Indians in a vastly inferior bargaining position, they were equally ambiguous. He talked about opening the lands for settlement in one breath, and something more than that in the next. Further, even the instructions given to McLaughlin by Indian Commissioner F. E. Leupp are ambiguous. As quoted in the dissenting opinion, those instructions were as follows:

> The instructions given you before you conferred with the Rosebud Indians concerning the opening of Tripp County [the 1907 statute] may be followed *so far as applicable*.

Dissenting opinion at 24-25 (emphasis added, footnote deleted).

In light of these instructions and the history of relations between the Bureau of Indian Affairs and the Indians, we would be reluctant to hold that McLaughlin was necessarily following clearly expressed congressional intent.

The dissent also argues that weight should be given to the provisions of the statute with respect to school lands and intoxicating beverages. Certainly, some weight should be given to the school argument, but there was a similar provision in the act considered in *Long Elk* and we held it was of minimal importance in light of the entire record. *United States v. Long Elk, supra* at 1038-1039. Very little weight can be given to the liquor argument. As the government correctly points out, the Indians specifically requested a 1910 amendment to the act which made federal liquor laws applicable to all reservation lands held by non-Indians, whether those lands were opened to settlement by the 1908 Act or not.

A fourth factor cited by our colleague as being important is the legislative history. Again, the dissent refers to McLaughlin's meetings with the Indians, Leupp's instructions to McLaughlin, and the South Dakota congressional delegation's statements on the issue. No reference is made to any new quotation from the Congressional Record. We are left then with the ambiguous statements previously discussed.

The fifth factor discussed was whether an agreement between the government and the Indians existed which

indicated a congressional intent to diminish the reservation. The dissent concedes there was no written or oral agreement to indicate a contemporaneous understanding. However, it professes to find support for its view in two facts: McLaughlin reported to his superiors that "the general sentiment of the Indians in council with me * * * was in favor of the relinquishment," dissenting opinion at 41-42, and the South Dakota congressional delegation reported similarly to Congress. We are unwilling to find a clear congressional intent from these obviously self-serving and after-the-fact statements.

The final factor discussed by our colleague as indicating congressional intent is the subsequent jurisdictional treatment of the settlement portion of the reservation. In our view, this history can be read in about any way the reader likes. Simply stated, South Dakota has, at times, asserted criminal jurisdiction over this and other reservations and, at times, it has not. We acquiesced in the exercise until Judge Stephenson carefully examined the matter in *Erickson* in 1973, and Judge Bright reexamined it in *Long Elk* in 1977. Both judges held the exercise was improper because the reservations had not been diminished. We adhere to their decisions and to our opinion in *New Town*. These opinions not only have the virtue of clearly delineating the lines of authority in the lands in question, but they are consistent with decisions of the Supreme Court that diminishment of a reservation should only be found where the intent of Congress for such diminishment is clear and unambiguous.

The District Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

McMILLIAN, Circuit Judge, dissenting.

I must respectfully dissent.

I note initially the narrowness of the issue before this court: whether the State of South Dakota or the federal government has criminal jurisdiction over that portion of the Cheyenne River Indian Reservation which was opened for settlement in 1908. Access to federal benefits and programs by Indians living in the opened portion is not affected by this decision. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615-616 n.48 (1976). In Morton v. Ruiz, 415 U.S. 199 (1974), the Supreme Court held that federal benefits and programs are available to tribal members living "on or near" the reservation. Because the area opened for settlement is near the reservation, members of the Cheyenne River Sioux Tribe living in the opened area remain eligible for the various benefits and programs.

Prior to 1850, the Indians, who had been pushed west of the Mississippi by white settlers, roamed freely. As the number of settlers in the country grew, they began pushing westward. United States ex rel. Condon v. Erickson, 478 F.2d 684, 686 (8th Cir. 1973). To appease both the settlers and the Indians, who did not want farmers, ranchers and railroads destroying their way of life, a treaty was entered into in 1868 creating the Great Sioux Reservation--twenty-five million acres over which the Indians could live as they pleased. 15 Stat. 635 (1868). In 1877, however, the Black Hills region of this reservation, a total of 7,500,000 acres, was severed. 19 Stat. 254 (1877). In 1889, the rest

of the Great Sioux Reservation was divided into six separate reservations and the "surplus land," a total of 11,000,000 acres, was opened for settlement. 25 Stat. 888 (1889). Thereafter Congress addressed the remaining six reservations individually and, by statute, opened the "surplus" lands of each. Colonel James McLaughlin, the Indian Inspector sent to negotiate the sale of the western portion of the Cheyenne River Reservation, explained the reasons behind this process to the Indians on this reservation:

> I know the sentiment of the Indians regarding their reservations and of their desire to hold them intact, which is only natural, but for the Indians to hold large tracts of unused land is now impossible, my friends, and you must bring yourselves to accept the inevitable, and rely upon the Department to obtain for you reasonable compensation for the lands you do not need.
>
> Large reservations were possible in the past, but there was then what was known as a frontier.
>
> That was when the principal portion of the population of this country lived east of the Mississippi River, but the tide of emigration from European countries to the United States forced home seekers constantly westward from the east and later on eastward from the west until the two waves met and obliterated the so-called frontier.
>
> There is no more frontier where settlers may find homes readily, and the steadily increasing population of the country demands all available land possible for the incoming settlers. The demand for land for home seekers is now so great that Senators and Congressmen are being constantly urged by their constituents to open additional lands to settlement, and the sentiment in Congress to open Indian reservations has been growing stronger each succeeding year for some years past, until the sentiment now prevails that Indians may only retain what land they actually need and can make proper use of.[1]

[1]Minutes of Council Meeting held by James McLaughlin with Cheyenne River Indians, S. Rep. No. 439, Part 2, 60th Cong., 1st Sess. 19 (1908).

While I am painfully cognizant of the unfairness of the federal government's policy toward the American Indian, I cannot ignore Congressional intent. Cf. DeCoteau v. District County Court, 420 U.S. 425, 449 (1974).

In 1973, this court, in United States ex rel. Condon v. Erickson, supra, addressed the precise issue which is before us today. Condon, a member of the Cheyenne River Indian tribe, was convicted of rape by a South Dakota court. In a habeas corpus petition, Condon argued that the State was without jurisdiction to try him because Eagle Butte, where the crime was committed, was "Indian country" and within exclusive federal jurisdiction. We agreed, holding that that portion of the Cheyenne River Reservation which was opened for settlement in 1908 retained its reservation status. Erickson, supra, 478 F.2d at 689. Our holding, which overruled sixty years of precedent, focused on Seymour v. Superintendent, 368 U.S. 351 (1961), which recognized that lands opened for settlement could retain their reservation status.[2]

[2]This court's opinion was also based upon two other cases which can no longer be seen as supporting the position in Erickson: McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973), and City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972). McClanahan "reaffirmed the long standing 'policy of leaving Indians free from state jurisdiction and control [which] is deeply rooted in our nation's history.'" Erickson, supra, 478 F.2d at 688-89. McClanahan, however, is not especially appropos to the issue before us. There the Court held that Arizona could not impose personal property tax on Indians who resided on the reservation and derived their entire income from reservation sources. The issue in McClanahan was whether Indians on a reservation had a right to govern themselves, while the issue before us is a more preliminary question, that is, what exactly is the reservation.

In New Town this court held that that portion of the Fort Berthold Indian Reservation which was opened for settlement in 1910 retained its reservation status. We based our decision on the fact that the 1910 statute stated: "[n]othing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which

In Seymour, Paul Seymour, a member of the Colville Indian Tribe, was imprisoned in a Washington State Penitentiary for attempted burglary, under a state sentence. He petitioned for habeas corpus on the ground the State of Washington had no jurisdiction because the crime was committed in "Indian country" and thus the federal courts had exclusive criminal jurisdiction pursuant to 18 U.S.C. § 1153. The state supreme court held that the land upon which the crime occurred was once part of the Colville Indian Reservation but that it lost this reservation status when the southern part of this reservation was opened for settlement in 1906. The United States Supreme Court reversed stating that merely because the reservation had been opened for settlement did not mean it lost its reservation status. Seymour, supra, 368 U.S. at 357-58.

At the time Erickson was decided, it appeared that the benefit of doubt Seymour gave to the Indians was the approach

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they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act." We reasoned that the right to be subject to exclusive federal jurisdiction is a "benefit" of which the Indians could not be deprived, and therefore the opened area retained its reservation status. The inclusion of this phrase in a statute opening part of a reservation for settlement can no longer be seen as indicative of Congress's intent on the disestablishment issue, however. In all of the statutes which have been held to have terminated the reservation status of those portions of South Dakota reservations opened for settlement, this phrase was also included. 33 Stat. 256, Art. V (1904) (Rosebud Reservation); 34 Stat. 1230, § 8 (1907) (Rosebud Reservation); 36 Stat. 448, § 11 (1910) (Rosebud Reservation); 36 Stat. 440, § 11 (1910) (Pine Ridge Reservation). (This phrase was not included in the statute opening the Lake Traverse Reservation, 26 Stat. 1036 (1891), but it was not necessarily as appropriate to include it in the Lake Traverse statute because, unlike all of the other South Dakota reservations opened for settlement, the entire Lake Traverse Reservation, not a part of it, was opened for settlement.)

Because of the problems in the above two cases the primary support for the Erickson decision must be found in Seymour.

which should be taken in determining the status of Indian lands opened for settlement. In light of recent Supreme Court cases, however, especially Rosebud Sioux Tribe v. Kneip, supra, it appears this trend has shifted. In Rosebud, the Rosebud Sioux Tribe sought a declaratory judgment to settle the question whether those parts of the original reservation, as defined in 1889, were disestablished from the rest of the reservation when they were opened for settlement by statutes in 1904, 1907 and 1910. Rosebud made clear that Seymour was not to be read so broadly: Seymour did not establish that an area opened for settlement always retained its reservation status; it merely made clear that a party could not rely merely on this fact to prove disestablishment of reservation status--it must adduce additional evidence which demonstrates Congress's intent to terminate reservation status. Rosebud, supra, 430 U.S. at 584.

In 1977, the South Dakota Supreme Court also addressed this jurisdictional issue, but in a slightly different context. Stankey v. Waddell, 256 N.W.2d 117 (S.D. 1977). Sophie Stankey, an enrolled member of the Cheyenne River Sioux Tribe, sought abatement of her state personal property taxes on the ground she was exempt from such taxation because her personal property was within the boundaries of the Cheyenne River Reservation. The property was on territory in that portion of the reservation which was opened for settlement in 1908. The South Dakota Supreme Court questioned the continuing validity of this court's decision in Erickson and held that the area opened in 1908 was no longer part of the Cheyenne River Reservation and, therefore, Ms. Stankey was subject to South Dakota personal property taxes.

I am persuaded by Rosebud and the voluminous record in the present case, which supports the position taken in Rosebud, that Erickson should be overruled. I also believe

that to the extent this court's opinion in United States v. Long Elk, 565 F.2d 1032, 1036 n.10 (8th Cir. 1977), reaffirmed Erickson, it too should be overruled.

The legal principles guiding this court are well established. Our task should be to determine whether, in 1908 when Congress opened the western and northern portion of the Cheyenne River Indian Reservation, it intended to disestablish the original boundaries of the reservation. Rosebud, supra, 430 U.S. at 586. As the majority noted, "[a] Congressional determination to terminate must be expressed on the face of the statute or be clear from the surrounding circumstances and legislative history," Mattz v. Arnett, 412 U.S. 481, 505 (1972), and all ambiguity in ascertaining Congress's intent is to be resolved in favor of the Indians, Rosebud, supra, 430 U.S. at 586.

As stated, courts facing this question have recognized that the mere fact part or all of a reservation is opened for settlement does not necessarily indicate Congress's intent that the opened portion loses its reservation status. Rosebud, supra, 430 U.S. at 586-87; Seymour, supra, 368 U.S. at 357-58; Erickson, supra, 478 F.2d at 687. In other words, when a reservation is opened for settlement, it is possible Congress intended to sever the opened portion of a reservation, causing that area to lose its reservation status and the remaining part of the reservation to have new, circumscribed boundaries; but it is also possible Congress intended to make available to settlers unclaimed plots of land within a portion of the existing reservation, leaving the original reservation boundaries intact. Erickson, supra, 478 F.2d at 687.

The factors courts have focused on to ascertain Congress's intent on this issue are: (1) the historical context of the

statute, cf. DeCoteau, supra, 420 U.S. at 431-32; Long Elk, supra, 565 F.2d at 1036; (2) the language of the statute, specifically, whether the term "cede" is used, e.g., Rosebud, supra, 430 U.S. at 596-97; DeCoteau, supra, 420 U.S. at 439, n.22; (3) the role of the United States government and whether the Indians were paid a sum certain, DeCoteau, supra, 420 U.S. at 448; (4) the legislative history, Rosebud, supra, 430 U.S. at 592; Long Elk, supra, 565 F.2d at 1039; (5) whether an agreement was reached with the Indians, Long Elk, supra, 565 F.2d at 1039; and (6) the jurisdictional treatment of the area in question since it was opened for settlement, id. In my view, three of these factors--the language of the statute, the role of the United States government and whether the Indians were paid a sum certain, and whether an agreement was reached--are not relevant to the boundary issue. I believe, however, that consideration of the remaining factors demonstrates that Congress intended to alter the original boundaries of the Cheyenne River Reservation when it opened for settlement the western and northern parts of this reservation in 1908.

The Historical Context

The historical context of the 1908 statute opening the western portion of the Cheyenne River Indian reservation cannot be underestimated. The statute was not an isolated legislative endeavor to bring settlers into the 1,234,000 acres thereby made available,[3] but was part of a much larger movement in Congress prompted by the western states to open as much Indian land as possible in order to attract settlers.

[3]The portion of the reservation opened for settlement by the 1908 act consisted of 1,728,000 acres. Of this area, 494,005.26 acres were already allotted to the Indians. This left about 1,234,000 acres actually available for settlement.

For example, between 1890 and 1910, Indian reservations in California, 27 Stat. 52 (1892), Washington, 34 Stat. 80 (1906), Montana, 33 Stat. 352 (1904), Oklahoma, 34 Stat. 80 (1906), South Dakota, e.g., 34 Stat. 460 (1908), and North Dakota, 36 Stat. 455 (1910), were opened for settlement. Of the nine reservations in South Dakota, all or part of six were opened for settlement between 1891 and 1910. The Lake Traverse Reservation was opened in 1891; the other five reservations were opened by six statutes passed in the six years between 1904 and 1910. These statutes were sponsored by essentially the same Congressmen[4] and the negotiations preceding the passage of the statutes were conducted by the same individual, Colonel James McLaughlin.[5] Furthermore, as

[4]Senator Gamble served in the Senate from 1900 to 1912. Congressman Burke served in the House from 1900 to 1906, when he was defeated. Burke was reelected in 1908, however, and served until 1914. Comment: New Town et al: The Future of an Illusion, 18 S.D.L. REV. 85, 88 n.9 (1973).

Senator Gamble sponsored in the Senate every bill opening parts of South Dakota reservations which was passed during his tenure. With one exception (Lake Traverse Reservation), this included all of the statutes opening lands in South Dakota which were ever passed, i.e., the 1904, 1907 and 1910 Rosebud statutes, S. Rep. No. 651, 58th Cong., 2d Sess. 1-12 (1904); S. Rep. No. 6838, 59th Cong., 2d Sess. 1-7 (1907); S. Rep. No. 68, 61st Cong., 2d Sess. I-5 (1910); the 1908 Standing Rock and Cheyenne River Statute, S. Rep. No. 439, Parts 1 and 2, 60th Cong. 1st Sess. (1908); the 1910 Pine Ridge Statute, S. Rep. No. 69, 61st Cong., 2d Sess. 4-5 (1910).

Congressman Burke sponsored in the House every bill opening parts of South Dakota reservations which was passed during his tenure. This included four of the seven such statutes ever passed, including the 1904, 1907 and 1910 Rosebud Statutes; H.R. Rep. No. 443, 58th Cong., 2d Sess. 1-19 (1904); H.R. Rep. No. 7613, 59th Cong., 2d Sess. 1-8 (1907); H.R. Rep. No. 429, 61st Cong., 2d Sess. 1-5 (1910); and the 1910 Pine Ridge Statute, H.R. Rep. No. 333, 61st Cong., 2d Sess. 2 (1910).

[5]McLaughlin negotiated with the Rosebud Indians in 1904, 1907 and 1910, Rosebud, supra, 430 U.S. at 590, 606, 610; the Standing Rock Indians in 1908, Long Elk, supra, 565

discussed infra, the same statutory scheme pervades all the statutes.

In the early twentieth century there was considerable population growth in South Dakota: in 1890 there were 349,000 people in the state; by 1910 there were 580,000,[6] an increase of 66%. The railroads were extending their lines through the state, cf. DeCoteau, supra, 420 U.S. at 431, and cattlemen arrived to take advantage of the reservation lands being leased by the Indians.[7] The South Dakotans did all they could to encourage this settlement in their state. It was imperative, for economic survival, that the barren, sparsely settled western states, including South Dakota, attract more settlers who would help build farms and towns. Every South Dakota resident was expected to do his share of

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F.2d at 1032; the Cheyenne River Indians in 1908, S. Rep. No. 439, Part 2, 60th Cong., 1st Sess. (1908) and the Pine Ridge Indians in 1910, United States ex rel. Cook v. Parkinson, supra, 396 F. Supp. at 487.

[6]Hoxie, Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, at 46.

[7]In addition to its allotment efforts, the Indian Office also began a program of leasing unallotted reservation land to cattlemen. The first leases were approved in 1902 and by 1904 all of the tribunal land on the preserve had been rented. The leases provided the tribe with an annual income of $90,000 and Indian heads of families were allowed to run 100 head of cattle on the range. Agent Ira Hatch reported that because of these provisions members of the tribe were 'well pleased' with the arrangement. Id. at 38.

It is questionable whether the land on the Indian reservations not actually being used for farmland by the Indians was "surplus" land if the Indians were able to put it to use by leasing it.

"boosting," that is, "building up [South Dakota] by offering encouragement to the stranger from other states who [was] now coming to make his home [in South Dakota]."[8]

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[8]Just Keep Boosting

> While on the subject of new settlers, it might be wise to ask if you are doing your proper share toward building up your home state by offering encouragement to the stranger from other states who is now coming to make his home among us? Are you meeting him with a hearty hand-clasp, telling him that he had come to the grandest state in the west - or anywhere on earth - and that if he will only try he can raise anything on his new land which he could raise back where he came from? Are you boosting, or are you too busy to even try to make him feel at home among strangers? A little encouragement offered is the one best thing in the world -- and doesn't cost you a cent to give. Not advice, but encouragement.
>
> Make the newcomer feel that he has come among as grand a people as is the state. Make him feel that he is welcome, that he is going to be always welcome when he comes to your town to do his trading, and, in this way, you not only give him encouragement, but you are also building up your town. Because he is coming to the town where he has been made to feel welcome to do his trading. So build up your circle of friends and your town. Even if you are well off and the newcomer is not, make him welcome; because he may in a few years be an independent as are you if he takes advantage of his opportunities and works hard.
>
> Speaking from the viewpoint here at Pierre, nothing better could be done for the future of this city than the organization of an "Encouragement Club"--who would meet all newcomers and tell them they are "welcome to our city," make them feel at home in every way, incidentally giving the newcomer such information as he might wish in regard to what crops he should put in, and other information helpful to him. He could be made to casually meet the merchants of the town and become acquainted with them. All of these to boost, of course, and in every way offer further encouragement to the stranger.
>
> We are a busy people here in the Sunshine state, but we should be able to find time to make the newcomer among us feel that we are glad that he has come. It

The following excerpts from statements by contemporary South Dakota leaders are representative of the single-minded concern the South Dakota citizens had for the Indians' land and corresponding callousness toward the rights of the Indians.

> The Indian reservations have stood as a menace to the development and growth of the Commonwealth.[9]
>
> [The Lake Traverse Reservation] is a great detriment to our interests, as it blocks the progress of two or three lines of railroad that we are very anxious to see completed. We need these roads badly, and the opening of the reservation would give new impetus to immigration which has been attracted by government lands further west. Any information that will enable the citizens of this section to render any service that may be needed in hastening the opening will be appreciated.[10]

The significance of this boosterism movement, for our purposes, is its singular concern with obtaining some of the vast reserves of Indian land which were "readily available." Especially significant is the total disregard for the welfare

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> only takes a moment to say a kind work of encouragement and in almost every case it is a boost for your town and yourself. Say it--and boost all the time. Not because there is any need to worry about the future development of South Dakota, just beinnning; for it is being made evident that the future is to be the grand one which the state and its opportunities rightly deserve.

Daily Capital Journal (Pierre, South Dakota) April 13, 1908.

[9]Senator Burke when submitting a 1910 bill to the Senate which would open part of the Rosebud reservation. 45 Cong. Rec. 1074 (1910).

[10]Letter from a Banker in Milbank, South Dakota to the Secretary of the Interior. DeCoteau, supra, 420 U.S. at 431 n.8.

of the Indian, including any consideration of whether terminating the reservation status of the land opened for settlement might be a disservice to those Indians who were still living on the opened portion.[11]

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[11] It is interesting to note the rationalizations engaged in by various individuals who supported obtaining the lands of the Indians. For example:

> I now believe that it will be manifestly better for the Indians to have their surplus lands opened to settlement, as it brings in white settlers among them, from whom the Indians may more readily acquire white man's civilization and industrious habits . . . . (McLaughlin, in speaking to the Indians at Cheyenne River Reservation, S. Rep. No. 439, Part 2, 60th Cong. 1st Sess. at 19 (April 15, 1908).
>
> . . . and I believe that the placing through what were heretofore reservations actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of little value. (Congressman Burke on the floor of the House, 45 Cong. Rec. 5456-57 (1910)).
>
> I believe greater success [in teaching Indians the best methods of advancement] would be obtained by making it possible for the Indians to mingle with the whites and thus be educated by the example which would be set before them by a class of white farmers. [Letter from Indian Agent Thomas Downs to the Commissioner of Indian Affairs, Nov. 23, 1907], Hoxie, Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, Appendix 7.

The actual influence of the white settlers appeared to be less than salutary, however. According to Thomas J. King, Superintendent at the Reservation:

> The opening of Cheyenne River Reservation was morally disadvantageous to these Indians because the law provided or created, at least for a time, a community without law or officers for the enforcement of the law. This was quickly taken advantage of by bootleggers, gamblers, horse thieves, cattle rustlers and soldiers of good fortune generally. The conditions which existed in this country for about a year after the opening furnished a disgraceful example to the Indians of this reservation

In conclusion, the 1908 statute opening the Cheyenne and Standing Rock Reservations must be viewed in the following context: the "booster" spirit prompted the opening of the reservations for settlement; the same South Dakota Congressmen initiated and sponsored all six statutes; the same individual negotiated with the Indians on all six statutes; and the statutes were passed within six years of one another. Most importantly, as will be discussed in the next two sections, the legislative history indicates that the Indians and lawmakers believed the various statutes affected the respective reservations in the same manner.

The Statutory Language

The term "cede" has been viewed as evincing a "clear congressional intent to terminate the 'Indian country' character" of areas within reservations which are opened for settlement. See, e.g., United States ex rel. Cook v. Parkinson, 396 F. Supp. 473 (D.S.D.), aff'd, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). The 1908 statute opening the Cheyenne River and Standing Rock Reservations contains no "cession" language. Some courts would hold, solely on this basis, that Congress did not intend to terminate the reservation status of the area opened for settlement. See, e.g., Parkinson, supra, 396 F.Supp. at 479, aff'd,

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> and reflected little or no credit on the wisdom and foresight of the government. (Appendix 81, answer to question 10a).
>
> No one can appreciate the character of the towns that have sprung up on the ceded lands and how detrimental to the Indians all their environments and temptations unless he has been here and knows conditions from on the ground. Gambling, whiskey, prostitution and usury are to be found in abundance and the Indian is easy prey." Hoxie, Jurisdiction on the Cheyenne River Indian Reservation, supra, at 119.

525 F.2d at 122-23; Ellis v. Page, 351 F.2d 250, 252 (10th Cir. 1965). Clearly, at least until recently, the presence or absence of this language, if not determinative, was one of the more crucial factors courts relied upon in assessing Congress's intent on the boundary issue. See, e.g., DeCoteau, supra, 420 U.S. at 439; Long Elk, supra, 565 F.2d at 1039.

In my opinion, the cession language in the statute is not relevant to the disestablishment issue. The assumption supporting the importance heretofore attached to this language was that the word was reflective only of the boundary issue and that understanding this, Congress used it with precision. See, e.g., Parkinson, supra, 396 F. Supp. 473. I believe it is apparent that Congress did not use this word with precision.

This is shown first by the fact that time and again the drafters of the legislation and the government representative sent to explain the legislation to the Indians stated that statutes with cession language had the same result as statutes with no cession language. For example, in presenting to Congress the 1907 statute which opened part of the Rosebud Reservation for settlement, Congressman Burke, the act's sponsor, stated: "It is in line with the recent bills which have been passed affecting the sale of Indian reservations."[12] The 1907 bill was identical to the statute before us today in that it contained no cession language. The only two prior bills which had been passed opening reservations in South Dakota (the bills to which Congressman Burke referred) contained cession language.

In another example, Colonel James McLaughlin, the representative of the Secretary of the Interior sent to explain the statute to the Indians, told the Rosebud Indians:

[12]41 Cong. Rec. 3104 (1907).

"You must bear in mind that this agreement [the 1907 statute] provides for the opening of Tripp County the same as your Gregory County lands are being disposed of [by the 1904 statute]."[13] Again, the 1907 statute contained no cession language; the 1904 statute clearly did.

In colloquy especially pertinent to our inquiry, McLaughlin told the Indians on the Cheyenne River Reservation, when negotiating for the 1908 statute:

> In 1901, six years ago last fall, I made an agreement with the Rosebud Indians for the payment of a lump sum consideration of $1,040,000. Congress rejected it, but provided for another plan which is nearly similar to this of yours. [emphasis added][14]

The agreement negotiated six years before, which McLaughlin referred to, is the 1904 Rosebud statute which has at least four references to the cession of Indian lands. The 1908 statute which McLaughlin explained would have a similar effect as this 1904 Rosebud statute had no references to cession of Indian lands.

Lastly, McLaughlin's only instructions from F.E. Leupp, the Commissioner of Indian Affairs, regarding his negotiations with the Indians on the Cheyenne River Reservation were simply:

> The instructions given you before you conferred with the Rosebud Indians concerning the opening of Tripp

[13]Council Meeting held by McLaughlin with Rosebud Indians, December 14, 1906, 41 Cong. Rec. 286 (1906-07).

[14]Council Meeting held by McLaughlin with Cheyenne River Reservation Indians, March 16, 1908, S. Rep. No. 439, Part 2, 60th Cong., 1st Sess. 23 (April 15, 1908).

County [the 1907 statute] may be followed so far as applicable.[15]

In the instructions concerning the opening of Tripp County, Leupp told McLaughlin:

> You are now at liberty to . . . enter into negotiations with the Rosebud Indians for the cession of the surplus unallotted land in Tripp County . . .;
>
> [T]he Department feels that the disposal to be made of the proceeds arising from the cession is a subject requiring most careful and earnest consideration . . .;
>
> The land ceded should be disposed of under the general provisions of the homestead and townsite laws of the United States . . .;
>
> The following would seem to be fair terms, similar to those in the disposal of the ceded lands in Gregory County [the 1904 Rosebud statute]. . . .[16]

The above instructions to McLaughlin are significant in three respects. First, Leupp's Rosebud instructions provide another example of an individual familiar with Indian legislation explaining that a statute with no cession language (the 1907 Tripp County statute) will result in cession of lands. Further, more indirectly, Leupp explains that the 1907 statute, which has no cession language, will have the same effect as the 1904 statute, which clearly had cession language. The second significant aspect about McLaughlin's instructions is that, by reference to the Rosebud instructions, Leupp tells McLaughlin to negotiate with the Indians on the Cheyenne

[15]Letter from F.E. Leupp, Commissioner of Indian Affairs, to James McLaughlin, December 26, 1907.

[16]Letter from F.E. Leupp to James McLaughlin, December 5, 1906.

River Reservation for the cession of their lands, even though there is no reference to cession in the statute. Lastly, the interchange of instructions regarding two different reservations and two different statutes demonstrates the fact that opening the various reservations for settlement was viewed as one ongoing process.

The fact Congressmen and others familiar with the Indian legislation did not use the term "cede" with precision is also shown in the actual negotiations concerning the 1908 statute between McLaughlin and the Indians. Both parties consistently refer to the cession of lands contemplated by the 1908 statute even though this statute has no reference to "cession" of lands.

For example, in McLaughlin's report to the Secretary of the Interior after his meeting at the Cheyenne River Reservation about the 1908 bill, McLaughlin stated:

> During the time our council was in session at the agency, a council was also being held at the Cherry Creek substation, 90 miles Southwest of the agency and . . . the farmer in charge . . . phoned to me . . . that the Indians of the Cherry Creek district . . . had decided by a vote of 39 to 19--being 2 to 1--to relinquish a part of their reservation, and that 27 had voted to have the cession embrace the northern part of the reservation, and 20 voted to have the cession taken from the west and north in about equal quantities.[17]

At the council meeting between McLaughlin and the Indians at the Cheyenne River Reservation, McLaughlin equated opening part of the Cheyenne River Reservation for settlement with altering the boundaries:

[17]Letter from McLaughlin to Secretary of Interior, March 30, 1908, S. Rep. No. 439, Part 2, 60th Cong., 1st Sess. 3 (April 15, 1908).

> I was for many years in favor of leaving the boundaries of the Indian reservations undisturbed; but the results of the system have caused me to change my mind . . . . I now believe it will be manifestly better for the Indians to have their surplus lands opened to settlement.[18]

The above carelessness with the term cede refutes the assumption that Congress used the word in a deliberate

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[18]Council Meeting held by McLaughlin with Cheyenne River Reservation Indians. Id. at 19.

References from McLaughlin's council meeting with the Indians at the Standing Rock Reservation are relevant to our inquiry because the same bill opened both reservations and thus was being discussed at both council meetings, and McLaughlin equated the effect the bill would have on each reservation. ("They [the Indians at Standing Rock] saw the wisdom of meeting the wishes of Congress in a very reasonable manner . . . . It is my desire that you meet the question in the same manner as Standing Rock." Id. at 20.

As can be seen, a change in boundaries was contemplated by the Standing Rock Indians despite the fact the statute has no references to cession:

> Thomas Frosted, one of the four said spokesmen for the council, expressed his individual views, favoring the opening of the tract indicated in blue pencil on the inclosed map, and he was followed by Tiaka, one of the leading Indians of the reservation, who also strongly spoke in favor of the cession thus indicated. Id. at 2 (emphasis added).

Arthur Tibbets (one of the spokesmen for the Indians) to McLaughlin:

> We have decided here in council to draw a line showing the land we are willing to cede. Id. at 7 (emphasis added).

McLaughlin: Now my friends, as to the lines which I have marked on this map in blue for you to relinquish, if every Indian on this reservation were to receive an allotment within the diminished reservation it would still leave you about 500,000 acres of surplus land, and as there are a great many of your people allotted in the tract to be ceded, you

manner. More to the point, the above references demonstrate that the statutes without the cession language were viewed by their drafters and other government representatives as evincing the same intent as statutes with the cession language. Therefore, I cannot agree that Congress used this term in a purposeful manner to indicate its intent on the boundary issue and thus on the ultimate issue of criminal jurisdiction.

Nevertheless, the question arises, if the term "cede" has no relevance to the disestablishment issue, why is it included in some statutes opening part or all of a reservation for settlement and not included in others. After considerable research into the voluminous record presented by the parties, it seems apparent that this language reflects a different scheme of paying the Indians for their land which was adopted by Congress to minimize the financial risks assumed by the federal government in obtaining Indian lands. Cf. Comment, New Town et al: The Future of an Illusion, 18 S.D.L. REV. 85 (1975).

Until 1904, § 1 of the statutes opening part or all of a reservation for settlement provided that the United States government would purchase the land from the Indians who "ceded, surrendered, granted and conveyed" all of their "claim, right, title and interest" in the land to the United States. In consideration the government paid the Indians a negotiated amount, usually $2.50 an acre. The government then sold the land to settlers. Problems arose with this

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18 continued

> will therefore have a great many acres of surplus land within your diminished reservation. Id. at 10 (emphasis added).

McLaughlin: The Marshall bill gives you permission to select any lands you may wish in the portion to be ceded . . . . Id. (emphasis added).

McLaughlin: It is with reference to the shares of minors derived from the proceeds of cession of tribal lands. Id. at 11 (emphasis added).

scheme, however, because when the settlers defaulted on their payments or when the land could not be sold, the government was unable to recoup the amount it had paid the Indians. Concern mounted in Congress over this problem. As Senator Platt stated:

> I do not know how many million acres still remain in Indian reservations which must in the future be opened to public settlement, but there are many millions, and at the rate we have been paying the Indians under the agreements made with them for such lands, the amount to be expended in the not very distant future will run up into the millions.[19]

Therefore Congress adopted a new policy. No longer would it buy the lands from the Indians and then sell it to settlers, but it would authorize the Secretary of the Interior to act as something of a real estate agent for the Indians and sell the land for the Indians to the settlers. And, no longer would the government pay the Indians a set sum; the Indians would receive, as payment for their lands, only what the settlers actually paid. The United States Treasury would keep these funds in a trust, expending them for the benefit of the Indians. In this way Congress obtained its goal--opening Indian lands for settlement--without having to pay a cent, and the Indians now assumed the financial risk of defaulting settlers and unsaleable land. Colonel McLaughlin, in explaining the change in payment scheme to the Rosebud Indians, said:

> There has been a sentiment growing in Congress for a number of years past, and is [sic] now stronger than ever, against paying Indians for ceded lands direct from the U.S. Treasury. This is what is referred to in my letter of instructions, which I read to you, as being a new departure in the manner of disposing of the surplus lands of Indian reservations, and instead of paying Indians direct from the U.S. Treasury as heretofore for their surplus lands; they will be paid from the proceeds of the sale of the lands ceded; the Department thus acting as trustee for the Indians, and the Interior Department having charge of the lands will dispose of them in such manner as will secure to the Indians the highest price obtainable. This is the new departure referred to, and I believe, my friends, that no treaty will ever again be made with Indians, by which they will receive a lump sum consideration for the tract ceded, but only what the Government is able to realize from the sale of the lands.[20]

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[19] 35 Cong. Rec. 4801 (1902).

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[20] Council Meeting held by McLaughlin with Rosebud Indians, July 25, 1903.

See also Congressman Burke's explanation of the new method of payment when he introduced to the House the 1904 bill opening part of the Rosebud Reservation:

> Both of these bills [referring to the House and Senate versions] present a new idea in acquiring Indian lands, and if this bill should be enacted into law it will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement, and if not immediately, ultimately, under the provisions of what is known as the free-homestead act.
>
> This bill [referring to the House bill] provides that the lands shall be disposed of under the homestead laws by the settler paying therefor and the proceeds paid to the Indians, and it is expressly provided by section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or to dispose of the same except as provided, or to guarantee to find purchasers for said lands, it expressly stating that the intention of the act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale thereof only as the same are received. H. R. Rep. No. 443, 58th Cong., 2nd Sess. (1904).

It should now be apparent why the language of § 1 in the statutes opening land for settlement changed from:

> The said Indians belonging on the _____ reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in and to all part of the Indian Reservation now remaining unalloted. See, e.g., 26 Stat. 1036; 33 Stat. 254 (1904).

to:

> [T]he Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion [of the reservation]. See, e.g., 35 Stat. 460 (1908); 36 Stat. 448 (1910).

That is, the "cede, surrender, grant and convey" language and "sell and dispose" language reflect two entirely different statutory schemes of how the lands are to be opened for settlement and how the Indians are to be compensated. Because the United States no longer purchased the land, it was not necessary for the Indians to "cede" it over; hence, the cession language was no longer appropriate. Thus, the language reflects a new method of payment rather than an attempt to delineate whether the boundaries of the original reservation remain intact after part or all of the reservation is opened for settlement.

Unfortunately, this analysis is complicated somewhat by the imprecision in the statutory language.

Of the six reservations in South Dakota opened for settlement only one was opened under the earlier method of payment: the Lake Traverse Reservation in 1891. The statute opening it was a prime example of a cession statute. The United States government purchased about 770,300 acres from the Indians for $2.50 an acre, and, in return, the Indians

promised to "cede, sell, relinquish, and convey to the United States all their claim, right, title and interest." DeCoteau, supra, 420 U.S. at 428; 26 Stat. 1036 (1891). The government then undertook to sell the land to settlers.

In 1901, negotiations began with the Indians on the Rosebud reservation to open for settlement Gregory County which was on the eastern edge of the reservation. Rosebud, supra, 430 U.S. at 590. As was then the custom, the United States promised to pay the Indians a set amount, $1,040,000, and the Indians agreed to cede, convey and transfer all of their interest in the land to the government. Id. at 591. The agreement was returned to Congress for ratification but the movement to change the method of obtaining Indians lands had begun and Congress would not ratify the agreement. Comment, New Town et al: The Future of An Illusion, supra, 18 S.D.L. REV. at 94. For three years Congress debated how the Indians should be compensated. Finally, in 1904, an agreement was reached and a statute opening Gregory County in the Rosebud Reservation was passed. 33 Stat. 254 (1904). Like many products of changing policy, this statute had elements of both the old and new policy. Section one stated:

> The Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant and convey to the United States all their claim, right, title and interest in . . . Gregory County . . . . Id.

However, in consideration the United States no longer promised to pay a sum certain; it merely "stipulate[d] and agree[d] to dispose of the [land] to settlers . . . and to pay to said Indians the proceeds derived from the sale of said lands." Id., Art. II. Justice Marshall has suggested that this combination of two payment policies may have resulted because "Congress found that working from an earlier document--

in this case the 1901 agreement--was easier than drafting a new law." Rosebud, supra, 430 U.S. at 619 (Marshall, J., dissenting). It is also possible that the drafters of the 1904 statute hoped that by parrotting the words of § 1 of the 1901 agreement they would obfuscate the dramatic change in the method of payment they were effecting. For whichever reason, the end result was a statute which contains the crucial cession language but which has none of the elements of the payment scheme of a "cession" statute, i.e., the government is not the purchaser but is merely the agent for the Indians, and the Indians are not guaranteed a set amount for their land but are promised only what the settlers actually pay.

Every statute opening reservations in South Dakota passed after 1904, including the one at issue, contains the new method of payment and § 1 of each statute reads: "The Secretary of the Interior . . . is . . . authorized . . . to sell and dispose. . . ." Section one of these statutes has no cessation language. In three instances, the land opened for settlement is referred to as the "ceded" land[21] in another portion of the statute. I cannot believe, however, because of the clear reason why cession language was originally used and because of the casual use of this language by the drafters of the statute, that these isolated references should be seen as Congress's attempt to speak on the complex issue of jurisdiction.

Thus, although this analysis is complicated somewhat by haphazard drafting of statutes, I think the unavoidable

[21] In the 1906 statute opening part of the Lower Brule Reservation for settlement and the 1910 statutes opening parts of the Pine Ridge and Rosebud reservations, a proviso in § 1 referred to the portion opened as "the tract ceded." 34 Stat. 124 (1906); 36 Stat. 448 (1910); 36 Stat. 440 (1910).

conclusion is that the word "cede" is nothing more than a reflection of changing payment schemes and is of little significance to the boundary issue.

The Supreme Court's treatment in Rosebud of the three statutes opening for settlement portions of the Rosebud Reservation supports the view that the cession language is not crucial. As stated, the 1904 statute, opening Gregory County for settlement, contained the § 1 cession language ("the Indians belonging on the Rosebud Reservation . . . cede, surrender, grant, and convey . . ."). The 1906 statute, opening Tripp and Lyman counties (which is identical to the 1908 statute before us), contained absolutely no cession language. The 1910 statute opened Mellette county and, like all statutes passed after 1904, did not contain cession language in § 1 but authorized the Secretary to sell and dispose of the opened land. However, a proviso in § 1 referred to the land opened as "the tract ceded." Despite this inconsistency in language among the statutes and the absence of the word cede in the 1907 statute, the Supreme Court held that all three statutes evinced an intent to terminate the reservation status of the respective areas opened, Rosebud, supra, 430 U.S. at 605-606. In so doing the Court reasoned that the statutory language was not the only indicia of Congressional intent and looked to other factors. Thus the Court began to deemphasize the significance attached to the cession language. Because of the history of the statutes opening for settlement Indian reservations in South Dakota, I believe this court should carry the Supreme Court's conclusion one step further. Not only is the presence or absence of cession language not "crucial" to the boundary issue, it is unrelated and thus irrelevant.

A finding that the cession language is not relevant to the disestablishment issue is important because the lack of

cession language, and the assumption that it manifests an intent not to disestablish reservation boundaries, has been used to counterbalance other aspects of the 1908 statute opening the Cheyenne and Standing Rock Reservations which courts have admitted could lead to the conclusion that Congress intended to disestablish the original reservation boundaries. See, e.g., Rosebud, supra, 430 U.S. at 599, 613; Long Elk, supra, 565 F.2d at 1038-39.

One of the characteristics which various courts have admitted is indicative of an intent to disestablish original reservation boundaries is the "school lands provision." This provision is present in the 1908 statute we are asked to interpret. Section 7 of the 1908 statute requires that sections sixteen and thirty-six of every township opened for settlement must be reserved for the State of South Dakota to be used for public schools. When South Dakota was granted statehood, the enabling statute required that sections sixteen and thirty-six of every township of land made a part of the state be reserved and used for school purposes. 25 Stat. 679, § 10 (1889); Rosebud, supra, 430 U.S. at 599. This enabling statute specifically declared that reserving sections sixteen and thirty-six for the state was not necessary if the townships were part of an "Indian reservation." Thus, the reasonable conclusion is that, because sections sixteen and thirty-six in every township in the opened portion were explicitly reserved for public schools in the 1908 statute before us, and because reserving these sections is not necessary if the townships are part of a reservation, the opened area is not part of the reservation.

Another example of an aspect of the 1908 statute which could lead one to believe Congress intended to disestablish the original reservation boundaries is section 10, the intoxicants provision, which was added by amendment in

February of 1910. 35 Stat. 46 (1910). This provision forbade the use of intoxicants in the area opened for settlement. Because use of intoxicants was already forbidden on Indian reservations, 27 Stat. 260 (1892), the specific ban in the opened territory would not have been necessary if this land was still part of the reservation.

In conclusion, I believe courts can no longer adhere to the view that the presence or absence of cession language is relevant to the disestablishment issue. A finding that the cession language is irrelevant to the disestablishment issue would have two immediate consequences. First, we could not rely on this language to ascertain Congress's intent on the boundary issue but must look to other factors which are indicative of Congress's intent. Second, because there is no longer any statutory language to counterbalance the school lands and intoxicants provisions, the evidence these provisions provide of Congress's intent to disestablish boundaries becomes stronger.

The Role of the Federal Government and the Payment of a Sum Certain

In the past, courts have highlighted these two factors holding that placement of the U.S. Government in the role of purchaser of the Indian lands and payment to the Indians of a sum certain was evidence that the land opened for settlement ceased to retain its reservation status. Conversely, the fact that the government was less than a purchaser of Indian lands (i.e., served as a sales agent) and that the Indians were not paid a sum certain, was evidence that the land opened for settlement retained its reservation status. In the 1908 statute presently before the court the government was a sales agent, not a purchaser, and the Indians were paid only what the settlers paid over, not a sum certain.

On this basis, then, some courts would hold that the area opened for settlement retained its reservation status. I cannot agree.

As explained above, these two factors are interrelated with the first factor, the cession language: in "cession" statutes the government is a purchaser and the Indians are paid a negotiated amount. In the "sell and dispose" statutes the government serves as an agent for the Indians (selling the lands and collecting the proceeds) and the Indians are paid only what the settlers actually pay. It should be apparent, therefore, that these two factors, the role of the U.S. Government and whether the Indians are paid a sum certain, are similarly not indicative of Congress's intent on the boundary issue but reflect its intent to minimize the costs to the government of obtaining Indian lands.

Recently courts have begun to recognize this. The foremost authority originally attaching importance to the sum certain element was the Supreme Court in DeCoteau, where the Court distinguished the case before it, in which it found disestablishment, from Seymour and Mattz, where it found no disestablishment, on the following ground:

> The [cession statute] before us is a very different instrument . . . it appropriates and vests in the tribe a sum certain. . . . The [sell and dispose] statute in Mattz, by contrast, benefitted the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers. DeCoteau, supra, 420 U.S. at 448.

In Rosebud, however, two years later, the Supreme Court, over vigorous dissent, deemphasized the significance attached to the sum certain element. The Court acknowledged that the sum certain payment in DeCoteau "aided us in determining that congressional intent was to terminate the Reservation." Rosebud, supra, 430 U.S. 598 n.20, 596 n.18. But the Court

continued, "as the Court of Appeals in the instant case recognized, '[t]he determination of disestablishment . . . rests upon congressional intent, as to which method of payment, whether lump-sum or otherwise, is but one of many factors to be considered.' 521 F.2d at 102." Id. See also Erickson, supra, 478 F.2d at 687 (it is not significant that the proceeds of the sale were to be deposited with the Treasury and credited to the Indians).

It was in Rosebud also that the Court deemphasized the importance of the role played by the government, at least according to Justice Marshall's dissent. Justice Marshall highlighted the fact that the Rosebud statutes, which the majority found disestablished the original reservation boundaries, were similar to the Seymour and Mattz statutes, which were held not to have disestablished the boundaries, in that "Congress merely 'opened' a reservation--that is, made reservation lands available to nonIndians and acted as sales agent on behalf of the Indians." Rosebud, supra, 430 U.S. at 617 (Marshall, J., dissenting) (emphasis added). Justice Marshall lamented the fact that the majority was no longer attaching significance to the different role played by Congress in the "cession" and "sell and dispose" statutes. The majority did not explictly discuss the role of the United States in reaching its holding. However, Justice Marshall may well be correct for the majority held that the three statutes opening various parts of the Rosebud reservation disestablished the original boundaries of the reservation. In all of these statutes, as in the Seymour and Mattz statutes, where no intent to disestablish was found, the United States acted as "sales agent" for the Indians, rather than purchaser.

This court's opinion in Rosebud also recognized that the role played by the United States in the statutory scheme was not relevant to the disestablishment issue:

> The argument of the Tribe that . . . the Indian title to the lands "was not extinguished" rests in part upon the theory that under such acts "the United States acted as trustee to dispose of the land and credit the proceeds to the tribe." . . . The argument made will not withstand analysis in the light of the realities of the situation confronting the Congress at the time. . . . [T]he fact that a beneficial interest is retained [by the tribe] does not erode the scope and effect of the cession made, or preserve to the reservation its original size, shape, and boundaries . . . . Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 101-02 (8th Cir. 1975), aff'd, 430 U.S. 584 (1976).

In conclusion, I believe it apparent that the form of payment and role played by the United States government is again reflective of the scheme of payment rather than Congress's intent on the disestablishment issue and, like the words of cession, is not relevant to the disestablishment issue.

The Legislative History

In Erickson, supra, 478 F.2d at 688, this court noted that the House and Senate Reports are "silent as to the 1908 Act's effect upon the boundaries of the Cheyenne River Reservation." However, attached to these reports and expressly made a part thereof is correspondence from McLaughlin and the minutes of council meetings McLaughlin held with the Indians. This supplemental report, as quoted supra, shows that McLaughlin, who was sent to explain the treaty to the Indians, was told to follow the same instructions he had followed regarding the Rosebud Reservation, where he negotiated a change in boundaries. At the council meetings McLaughlin clearly equated opening the lands for settlement with a change in boundaries. Furthermore, McLaughlin told the Indians the statute they were considering would affect them in a similar manner as the statute which opened part of the Rosebud Reservation, where disestablishment was found. In

other words, in the only part of the legislative history where the issue was raised, it is clear a change in boundaries was contemplated.

Moreover, the legislative history for all three Rosebud statutes, which was not available to this court in Erickson, has been made part of the record in the case before us now. These documents, by themselves and because of the background they provide for otherwise inconclusive statements in the legislative history concerning the statute before us, shed considerable light on the term "cession" and the interrelationship of all statutes opening South Dakota Reservations. In these documents, the drafters of the legislation, the Commissioner of Indian Affairs and James McLaughlin repeatedly explain the new payment policy, equate the impact of statutes containing cession language with statutes containing no cession language and otherwise show that a change in boundaries is contemplated whenever Indian lands are open for settlement.

In conclusion, because of the wealth of information made available in this case, I do not believe this court should continue to say that the legislative history is silent. On the contrary, this history unequivocally demonstrates that disestablishment was contemplated in this case and that the 1908 statute before us was intended to have the same effect as other statutes where disestablishment was found.

Whether an Agreement was Reached with the Indians

Another factor which has been relied upon to help ascertain Congress's intent on the disestablishment issue is whether an agreement was reached between the negotiator on behalf of the government and the Indians. See, e.g., Long Elk, supra, 565 F.2d at 1039. In some cases a written

agreement signed by the Indians was obtained. See, e.g., Rosebud, supra, 430 U.S. at 587 n.2. In my opinion, the fact such an agreement was obtained does not necessarily mean the boundaries of the original reservation were altered, or conversely, if no such agreement was obtained, the boundaries of the original reservation were not altered.

Until 1903, the Indians' consent to partition of their lands was necessary. In 1903, however, the Supreme Court declared that, because Indians were wards of the United States government, their consent was no longer necessary before their lands could be taken. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). Therefore, after 1903, the lack of a written agreement signed by the Indians reflects the Supreme Court's decision in Lone Wolf, not whether or not the Indians consented to a change in boundaries.

However, an agreement with the Indians is still relevant in that it is a contemporaneous understanding of the Indians' perception of what the opening of their land entails. A written agreement would, of course, be the most enlightening representation of this understanding but none was obtained from the Cheyenne River Reservation Indians. Moreover, after reviewing the minutes of McLaughlin's meeting with the Indians, it is questionable whether an oral agreement was reached. The clear impression is that McLaughlin forced through the plans to open part of the reservation and the Indians were not at all sure they wanted to part with their land, especially under the terms McLaughlin offered. However, McLaughlin wrote the Secretary of the Interior that an agreement had been reached: "The general sentiment of the Indians in council with me at the agency was in favor of the

relinquishment . . . ."[22] And, both Senator Gamble and Congressman Marshall, the sponsors of the bill in Congress, reported that "[t]he bill as originally drawn was submitted formally to the Indians upon both reservations through an experienced Indian inspector, and after full conference with the Indians upon each reservation an agreement has been reached and the bill has been modified and amended in conformity to said agreement." S. Rep. No. 439, 60th Cong., 1st Sess. 4 (1908); cf. H. R. Rep. No. 1539, 60th Cong., 1st Sess. 3 (1908). Moreover, as discussed supra, the minutes of this council meeting demonstrate that McLaughlin and the Indians, while perhaps not reaching an agreement, were at the least both anticipating a change in boundaries if Congress got its way. I do not highlight these references by McLaughlin to an agreement reached with the Indians because I believe these admittedly "self serving statements" are evidence of an agreement. Rather, I believe these statements by McLaughlin, the official representative of the Congress, in his report to his superiors, are indicative of the information available to Congress and thus what Congress believed had transpired.

Subsequent Jurisdictional Treatment of the Opened Portion of the Reservation

The last major factor considered indicative of Congress's intent on the disestablishment issue is the jurisdictional history of the contested area after it was opened for settlement. Both parties have pointed to characterizations of the opened area made since 1908 by Congress and the Secretary of the Interior which they argue support their respective positions. Congress and the Secretary, in various statutes and regulations,

[22] S. Rep. No. 439, Part 2, 60th Cong., 1st Sess. 3 (April 15, 1908).

have referred to the opened area as "the Cheyenne River Indian Reservation" and as "the former Cheyenne River Indian reservation."[23] Appellant and the Tribe, as amicus, urge that these contradictory references result in an ambiguity

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[23]Some of the arguments advanced are fairly tenuous. The Supreme Court was faced with one of the arguments presented by the Tribe in this case. On December 27, 1935, the Secretary of the Interior approved a constitution and bylaws for the Cheyenne River Sioux Tribe which contains the following provisions:

> The jurisdiction of the Cheyenne River Reservation Sioux Tribe of Indians shall extend to the territory within the original confines of the diminished reservation boundaries which are described by the Act of March 2, 1889 (25 Stat. 888).

The tribe argues this approval provides implicit support for the view that the boundaries were not diminished. This reach for tangential support was similarly rejected by the Supreme Court in Rosebud, supra, 430 U.S. at 616 n.1.

The tribe, in its amicus brief, cites as another example of the Secretary's view that the opened portion was still part of the reservation the fact that he acquiesced in the tribe's insistence that the new Indian Agency be built "on the reservation." The Agency was built in Eagle Butte. However, the law does not require that the Indian Agency be built "on the reservation" as amicus states. Instead, it requires that the "agent for the Indians . . . reside among them [the Indians]." 15 Stat. at 636. Because Eagle Butte is in the center, geographically and demographically, of the original reservation, it was an ideal central location and used as the site for the agency for that reason, not because it was required to be "on the reservation." Hoxie, Jurisdiction on the Cheyenne River Indian Reservation, supra, Letter to Congressman Burke from John Mertens (attached to front cover of exhibit as Attachment "A").

In another example, the tribe argues that "the Secretary's actions under 25 U.S.C. § 463, which authorized the restoration of surplus lands to Indian reservations, provides further confirmation for the conclusion that the 1908 legislation did not disestablish affected reservation areas." In 1934, Congress provided that lands in portions of reservations which had been opened for settlement and which had never been purchased could be returned to the tribe "if [the Secretary of the Interior found] it to be in the public interest." The tribe points to a 1934 decision from the

which must be resolved in favor of the Indians. Were these scattered references all of the evidence available as to the subsequent jurisdictional treatment of the opened area, I would agree. There exists, however, evidence which is more relevant and also unambiguous on this point: the legal power, since 1908, to exercise jurisdiction in the opened area.

Since 1911 and until this court's decision in 1972, the case law consistently recognized that South Dakota had criminal jurisdiction in the opened area on nonallotted land. See, e.g., United States v. La Plant, 200 F. 92 (D.S.D. 1911); Lafferty v. State, 125 N.W.2d 171 (S.D. 1963); State v. Sauter, 205 N.W. 25 (S.D. 1925). At trial Mr. Aberle, the present States Attorney for Dewey County, South Dakota, testified that, based upon (1) his acquaintance with the two individuals who had served as States Attorneys since 1911 and his discussions with these gentlemen about

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23 continued

Solicitor of the Department of the Interior which states that Indians lands subject to a prior cession [i.e., a change of boundaries] could not be restored subsequently to an Indian reservation. 54 I.D. 559, 560 (1934). The tribe argues that, because of this decision and because these lands were restored to the tribe, the Secretary of the Interior did not believe the boundaries of the original reservation ever changed. However, in a subsequent decision the Solicitor held that it was not a prerequisite to restoring lands to Indians under this statute that the land still be part of a reservation. 56 I.D. 330, 333 (1938). Moreover, as the tribe argues, the Secretary, in his orders restoring various plots of land to the Cheyenne River Sioux Tribe, referred to the portion opened in 1908 as part of the reservation (implying, according to the tribe, that the opened area retained its reservation status). However, in this same order the Secretary also referred to the opened area as "ceded land" and as being outside the "existing reservation." 32 Fed. Reg. 14, 276 (1967); 22 Fed. Reg. 3693 (1957).

As can be seen, the arguments presented by the tribe to the effect that the Secretary has, since 1908, recognized the opened area to be part of the reservation are variously flawed.

the county's jurisdiction over crimes on the reservation, (2) his search of the county records and (3) his own knowledge as States Attorney since 1959, while the federal and tribal courts had assumed jurisdiction over the allotment land in the opened portion of the reservation since 1908, the State of South Dakota had assumed civil and criminal jurisdiction over the nonalloted lands in the opened portion until 1972. The County Commissioner for Dewey County and the U.S. Attorney who served from 1940 to 1969[24] also testified that the state courts exercised criminal and civil jurisdiction in nonallotted areas of the opened portion until Erickson in 1972.

Moreover, even sources quoted by Professor Hoxie, appellant's expert witness,[25] in his historical analysis,

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[24]Mr. Clayton, the U.S. Attorney for South Dakota from 1940 to 1969, was unable to testify in court on the day he was scheduled. The parties stipulated that he would testify that the State of South Dakota exercised criminal jurisdiction in the opened portion of the reservation.

[25]Dr. Frederick Hoxie, Ph.D, was retained by the government as an expert witness to document the history of the Cheyenne River Reservation. Professor Hoxie is a professor of history specializing in the American Indian. His one hundred thirty-four page report, with its accompanying one hundred eighteen appendices, has been extremely helpful. While I have made use of the facts presented by Professor Hoxie, I cannot, for the reasons outlined above, accept his conclusion as to the jurisdiction of that portion of the reservation which was opened for settlement in 1908.

On appeal appellant alleged as error the failure of the district court to let Professor Hoxie testify. The court admitted Professor Hoxie's report but restricted his testimony not on the ground "there is no such thing as an historian expert," as the government alleges, but on the ground Professor Hoxie's testimony, which admittedly would only highlight the report already in the record, would be duplicative. (Tr. 28, 36-37). There is nothing improper in such a ruling nor has it prejudiced appellant in any way since Professor Hoxie's extensive report speaks for itself.

show that South Dakota had criminal jurisdiction in the nontrust portions of the opened area.[26] Nevertheless, Professor Hoxie focused on two facts which he thought indicated the state did not have jurisdiction: (1) the federal government continued to exercise criminal jurisdiction and provide services for the Indians in the opened area, and (2) for a variety of reasons, the actual role of the state courts in exercising criminal jurisdiction in the opened area was marginal.

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[26]See, e.g., the following statement by Thomas King, the Superintendent of the Indians on the Cheyenne River Reservation where he acknowledges that legally the state had jurisdiction over Indians with certain allotments:

> If the trust patent is dated before May 8, 1906, the allottee is a citizen and has the rights of citizenship. By Act of Congress he is made subject to the civil and criminal laws of the State of South Dakota and he is subject to those laws if the state officers see fit to apply them to him. He is also entitled to the benefits of the civil and criminal laws of the State of South Dakota should he desire the benefit of those laws. However, it is generally found, where Indians of this class are living on trust allotments and living within an Indian reservation, that they are considered subject to the jurisdiction of the United States Government and its officers, by reason of the fact that they still maintain tribal relations and the United States Government has exclusive jurisdiction over their allotments and the land and county in which they reside." Hoxie, Jurisdiction of the Cheyenne River Indian Reservation, supra, at 118-119, quoting Letter from Superintendent King to Walter Huddleston, March 5, 1910 (Special Series A, Box 1, Records Group 75, National Archives).

King went on to point out that, as a matter of custom rather than by legal requirement, the State government did not assume its responsibility.

> It is also the custom of the county government to concede the jurisdiction of the United States Government and not to apply the state laws to such Indians as they would to white men, but to leave them to the jurisdiction of their agent. Of course you will understand by this that it is a practice or custom, not a legal condition." Id. at 119.

While it is true the federal government continued to exercise criminal jurisdiction and provide services[27] for the Indians in the opened portion of the reservation after 1908, this does not mean the state courts did not have jurisdiction. The law then provided that the federal government had jurisdiction over Indian allotments whether the allotments are within or outside reservation boundaries. United States v. Ramsey, 271 U.S. 467, 472 (1925); United States v. Pelican, 232 U.S. 442, 447 (1914). At the time the reservation was opened for settlement, fifty-five percent of the Cheyenne tribe had allotments in the opened portion and thereby occupied one-third of the acres opened for settlement. Hoxie, Jurisdiction of the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, at 38. The federal government still had responsibilities in these specified areas despite state jurisdiction over the rest of the opened area. Therefore, the fact that the federal government assumed these responsibilities does not detract from the conclusion that the State of South Dakota had criminal jurisdiction in the rest of the opened area.

The second point raised by Professor Hoxie, that the actual exercise of criminal jurisdiction by the state courts was minimal, also does not detract from the conclusion that the state courts legally had jurisdiction in the opened portion. According to Professor Hoxie, the criminal jurisdiction exercised by the state courts over the opened area was minimal for several reasons. The state courts were impoverished and, because most of the Indians did not pay taxes, they did not want to expend scarce resources on the Indians. Nor,

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[27]The federal government continued to provide the following services for the Indians on the opened portion of the reservation: Indian Schools, "boss farmers" (farmers assigned to the reservation to teach the Indians agricultural skills).

Professor Hoxie argues, were the Indians eager to get into state courts: the prejudice and lack of concern for rights of Indians made a fair trial unlikely. Lastly, the tribal courts and federal courts, as mentioned above, processed most of the Indian criminal matters in the opened portion, even after 1908.

There are, however, two problems with Professor Hoxie's argument that, because the exercise by state courts of criminal jurisdiction in the opened area was minimal, the state did not have such jurisdiction. First, I am not sure his picture of the state courts' inactivity over criminal matters in the opened portion of the reservation is reflective of the jurisdictional issue. Professor Hoxie's analysis covered only 1910 to 1920--clearly a time when South Dakota was still a frontier. Moreover, the county governments were not even organized until after 1908. It is doubtful, given the frontier mentality and the new and impoverished nature of the county governments, that the state courts assumed a very active role in law enforcement at all.

The second and by far more fundamental problem with Professor Hoxie's argument, in my view, is that he is ignoring what the law actually provided the state court's responsibility to be and is focusing instead on the failure of state courts to carry out their legally-imposed duties. In our endeavor to ascertain Congress's intent on the jurisdictional status of the opened portion, I believe what the lawmakers actually provided the state's jurisdictional power was to be is more relevant than how, by mismanagement, the state courts avoided the law.

In summary I find that, while at least initially the state courts were not efficient in assuming jurisdiction over the nonallotted area in the opened portion of the reservation, case law and officials charged with enforcing

the law recognized that the state courts had jurisdiction, at least until 1972, over unallotted land in the opened portion.

In conclusion, I believe we cannot look to the cession language in statutes or Presidential proclamations, the role played by the United States government, the fact the Indians were not paid a sum certain, or the lack of an agreement signed by the Indians as indicative of Congress's intent on the boundary issue. All of these factors originated for reasons completely unrelated to the boundary issue. However, the factors which are relevant to the boundary issue--the historical context, the legislative history and the subsequent jurisdictional treatment--show clearly that termination of reservation status was contemplated. The 1908 statute was one part of a comprehensive movement, the object of ~~which~~ was to disestablish as much Indian land as possible. The legislative history in this case and the Rosebud case demonstrates that a change in reservation boundaries was anticipated. Lastly, while the actual exercise of criminal jurisdiction by the State of South Dakota over the opened area was initially inconsistent, the state's legal power to exercise such jurisdiction, at least until Erickson, was clearly acknowledged by judicial precedent and by state and federal law enforcement officials. For these reasons I would hold that the portion of the Cheyenne River Reservation which was opened for settlement in 1908 was disestablished from the reservation and thereby lost reservation status.

Although I would hold that the portion of the Cheyenne River Reservation opened for settlement lost its reservation status, this holding would not necessarily settle the issue of whether the opened area is "Indian country" and thus whether federal or state courts have criminal jurisdiction over the area. Title 18 U.S.C. § 1151 provides that, in

addition to territory within an Indian reservation, "dependent Indian communities" and "all Indian allotments" are "Indian country" for the purposes of federal criminal jurisdiction.[28] Presumably because a ruling on the reservation status of the opened area could have resolved the jurisdictional issue, the parties did not present evidence on the question whether Eagle Butte is a "dependent Indian community" or an "Indian allotment."[29] I would therefore remand to the district

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[28]I realize that the possibility of retaining federal jurisdiction over random plots of land which are dependent tribal communities or Indian allotments will result in the unfortunate problem of checkerboard jurisdiction, where law enforcement officers will be forced to consult a map before they know their duties toward a particular area. See Seymour, supra, 368 U.S. at 358. However this cannot be helped. Such a result is mandated by 18 U.S.C. § 1151 and is possibly in effect at the present in the Rosebud, Pine Ridge and Lake Traverse Reservations as a result of court decisions. Rosebud, supra, 430 U.S. 584; DeCoteau, supra, 420 U.S. 425; United States ex rel. Cook v. Parkinson, supra, 525 F.2d 120.

[29]This court does not have sufficient evidence before it to answer the question whether federal jurisdiction continues over Indian allotments in that portion of the reservation opened for settlement. As stated, fifty-five percent of all Indians on the Cheyenne River Reservation had allotments on the portion of the Reservation which was opened in 1908. When these allotments were originally granted they were held in trust by the United States government for a period of twenty-five years. This trust provided that any conveyance of the land was null and void, a limitation which was designed to protect the Indians from their own improvidence. As long as the trust status of the allotments continues, there is federal jurisdiction over the allotments. United States v. Ramsey, 271 U.S. 467, 470 (1925); United States v. Pelican, 232 U.S. 442, 447 and 449-50 (1914). No evidence has been presented thus far in this case as to whether the trust status of these allotments has been extended such that it still remains today. Cf. DeCoteau, supra, 420 U.S. at 443 n.29.

court to provide the parties the opportunity to argue this point.[30]

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[30]Even if the real parties in the case, the United States and Glen Dupris, may not wish to litigate these additional issues, the amicus curiae parties, the Cheyenne River Sioux Tribe and the counties of North and South Dakota may wish to do.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U. S. COURT & CUSTOM HOUSE
1114 MARKET STREET
ROBERT C. TUCKER
CLERK
ST. LOUIS, MISSOURI 63101

December 20, 1979

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Prentice-Hall, Inc., Central Building, Englewood Cliffs, New Jersey 07632 ATTN: C. O. Clark, Opinion Clerk
United States Law Week, Bureau of National Affairs, 1231 25th St., NW Washington, D.C. 20037

Re: 78-1575 United States v. Glen D. Dupris

Dear Sirs:

Opinion of this Court in the above case was filed and sent to each of you on November 27, 1979. Please make the following corrections:

Page 10, Line 9 of dissenting opinion: 615-616 n.48 (1976) should read as 615-616 n.48 (1977)

Page 12, Footnote 2, Line 8: Erickson, supra, 478 F.2d at 688-89 should read as Erickson, supra, 478 F.2d at 689.

Very truly yours,

Robert C. Tucker

Robert C. Tucker
Clerk

lkl

APPENDIX B

OPINION OF DISTRICT COURT

United States District Court
District of South Dakota

Andrew W. Bogue
U. S. District Judge
318 Federal Building
U. S. Courthouse
Rapid City, South Dakota 57701

June 29, 1978

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Re: United States of America vs. Glen D. Dupris, CR77-30056-01

Gentlemen: MEMORANDUM OPINION

On June 1, 1977, the United States filed an information charging defendant Glen D. Dupris with two violations of 18 U.S.C. §1153, the Major Crimes Act. Defendant is a juvenile and an enrolled member of the Cheyenne River Sioux Tribe. The United States has charged that defendant committed a burglary and a larceny in the City of Eagle Butte, South Dakota.

Defendant, through his court-appointed attorney, moved this Court to dismiss the information for lack of federal jurisdiction upon the theory that the land upon which the offenses are alleged to have been committed is not "Indian country" as defined by 18 U.S.C. §1151. Defendant and his counsel thereafter entered into a stipulation of fact with the United States (docket entry 24).

The crucial facts underlying the jurisdictional question are these:

(1) The business establishment in which the crimes of burglary and larceny are alleged to have been committed is located on fee patented land.

(2) This fee patented land lies within the geographical boundaries of the Cheyenne Indian Reservation as established by an act of Congress on March 2, 1889, 25 Stat. 888.

(3) The land where the crimes are alleged to have been committed also lies within the geographical area which was opened to settlement by an Act of Congress on May 29, 1908, 35 Stat. 460, and a Presidential Proclamation of August 19, 1909, 35 Stat. 2500.

Thus, the question presented is whether or not the Act of May 29, 1908, disestablished that portion of the original Cheyenne River Indian Reservation within which defendant is alleged to have committed criminal acts.

I. PRELIMINARY STATEMENT

This Court was initially somewhat reluctant to even consider this jurisdictional question in that it appeared at first blush to be a matter that had been decided previously by the Eighth Circuit Court of Appeals. United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). Defendant and his counsel urged, however, that the guidelines set out by the Supreme Court in DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed. 2d 300 (1975), and

Rosebud Sioux Tribe v. Kneip, et al., 430 U.S. 584. 97 S.Ct. 1361, 51 L.Ed. 2d 660 (1977) required a reexamination of the question presented in Erickson, supra. Moreover, the Supreme Court of South Dakota, in the proper exercise of its jurisdictional authority, had held in June of 1977 that the Cheyenne River Indian Reservation was diminished by the Act of 1908; in effect, that Court had reached the result urged by defendant in this case. Stankey v. Waddell, 256 N.W. 2d 117 (S.D. 1977). This Court, therefore, scheduled a hearing and prepared to consider this jurisdiction question.

Before the hearing was held the Eighth Circuit Court of Appeals decided the jurisdictional question presented in United States v. Long Elk, 565 F.2d 1032 (1977). In a footnote reference to Stankey v. Waddell, the Eighth Circuit noted that the South Dakota Supreme Court had "questioned the continued validity" of the Erickson decision, but the federal appellate court went on to state:

> In Erickson, we could find no clear expression of an intent by Congress to diminish the size of the Reservation. Both the language of the Act and its legislative history appeared to us to be equivocal. We find no reason now to question our decision in Erickson. 565 F.2d at 1036, n. 10.

The Court further stated that the results in Rosebud, DeCoteau and Erickson were harmonious.

At this juncture it appeared on the one hand that the holding of Erickson, challenged by defendant, had been explicitly upheld; hence, this Court's inquiry would be unnecessary.

On the other hand, the Eighth Circuit's statement: "We find no reason now to question our decision in Erickson" seemed to imply that if there were a good reason, then Erickson would be reconsidered. Thus, this Court again went forward with the inquiry relative to the jurisdictional question.

The legal principles which have guided our inquiry were set out succinctly in the Supreme Court's opinion in Rosebud, 97 S.Ct. at 1363. Because our reasoning must be strictly guided by those principles, we will enumerate them here. In determining whether or not the boundaries of the Cheyenne River Indian Reservation were diminished by the congressional enactment of 1908, we must consider the following:

(1) Congressional intent is controlling.

(2) Doubtful or ambiguous expressions are to be resolved in favor of the Indians.

(3) Opening a reservation for settlement does not necessarily mean that the opened area loses its reservation status.

(4) The canon of construction requiring that doubtful expressions are to be construed in favor of the Indians, does not require a determination that reservation status survives congressionally manifested intent to the contrary.

(5) In order to ascertain congressional intent, a court is obliged to look at the Act in question, the surrounding circumstances and the legislative history.

Additionally, it is clear that an inquiry of this nature "may encompass all materials reasonably pertinent to the legislation...." Rosebud Sioux Tribe v. Kneip, et al., 521 F.2d 87,

(8th Cir. 1975) relying on DeCoteau, supra.

Ordinarily, an inquiry to find the meaning of an act begins with an examination of the text of the act in question. Consideration of legislative history and the circumstances surrounding the passage of the act is necessary only if an examination of the text of the act itself leads to the conclusion that its terms are unclear or that its meaning is ambiguous.

The situation in which this Court finds itself is, however, extraordinary in the following respects. In 1911 the question now presented was raised before a United States District Judge for the District of South Dakota in United States v. LaPlant, 200 F.92 (1911). Judge Willard, it appears, thought the act was plain on its face, and without resort to legislative history he concluded that the act opening the Cheyenne River Reservation had diminished it in a geographical sense. In 1972, pursuant to an order from the Court of Appeals for the Eighth Circuit, Judge Nichol, Chief Judge for the District of South Dakota, held an evidentiary hearing to consider the question that had been presented in LaPlant. Judge Nichol concluded that Congress had not by express language changed the 1889 boundaries of the Cheyenne River Reservation although it appeared that the 1908 Act had reduced the boundaries by implication. United States ex rel. Condon v. Erickson, 344 F.Supp. 777 (1972). On appeal Judge Stephenson, writing for the Eighth Circuit, stated:

> We cannot say that the 1908 Act on its face affected the exterior boundaries of the reservation, although it is admittedly a close question. Erickson 478 F.2d at 687.

Judge Stephenson then went on to state that the meaning of the 1908 Act with respect to reservation boundaries was "not clearly discernible by application of the traditional means of statutory construction." 478 F.2d at 688. In 1977 the Supreme Court of South Dakota, in light of the United States Supreme Court's opinions in DeCoteau and Rosebud, and after detailed examination of the legislative history, concluded that Congress had clearly manifested an intent to alter the boundaries of the Cheyenne River Reservation by the 1908 Act.

It is clear to this Court that the ultimate resolution of the question presented in this case will not be reached without a careful examination of the historical context in which the 1908 Act was passed. Therefore, we have undertaken to set out what we believe are important aspects of that historical context in a chronological order, and the Act itself will be examined in light of events and statements that preceded it.

Reference will be repeatedly made to a document attached to the memorandum filed by the United States which attachment is entitled: "Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908." This document was prepared by

Dr. Frederick E. Hoxie, an historian retained by the government. While this Court does not agree with many of the conclusions drawn in that analysis, it appears to constitute the foundation of the government's case; hence, we will try to deal with all of the major arguments contained therein.

II. THE HISTORICAL SETTING

The events of American history that preceded the enactment of so-called "surplus land statutes" that were to affect the lands formerly dominated by the Sioux Nation are well known to everyone involved in this case; hence, the sketch here can be very brief. The boundaries of the Great Sioux Reservation were established by treaty in 1868. By acts of Congress this reservation was split up into several smaller reservations. One of these was the Cheyenne River Reservation which was created in 1889. The land not encompassed by these smaller reservations became part of the public domain.

In 1889 congressional policy toward Indian tribes was undergoing significant change. Approximately ten years earlier a national policy of assimilation had been initiated.[1] The General Allotment Act or Dawes Act of 1887[2] was a result of this change in national policy. The change in policy was likewise reflected in section 12 of 25 Stat. 888 (1889) by which the Cheyenne River Reservation was established. Section 12 provided a means by which the Indians could sell and the

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[1]Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, (hereinafter "Hoxie") pp. 1-5.

[2]24 Stat. 388.

United States could buy portions of the remaining reservations for the purpose of making land available for settlers.

In an attempt to carry out this policy of assimilation, the federal government adopted a three-part program.[3] The first part of the program was a national system for the education of Indian children. The second component was a land allotment system designed to teach Indian people to be self-sufficient farmers. The third component was the extension of United States citizenship to individual Indians who accepted an allotment of land.

As was noted by the Eighth Circuit Court of Appeals in Erickson, this assimilation policy and the specific programs designed to effect it were the product of an alliance between "easterners sympathetic to the Indians and western politicians."[4] The easterners or reformers, whom Hoxie calls the "principal architects of the assimilation program,"[5] labored in the belief that the possession of private property (160 acre plots of ground) would be a great benefit to the Indians because it would tend to "raise" them to a higher stage of culture. The westerners may not have been very much concerned with theories of social evolution, but did agree with the desirability of the allotment idea inasmuch as it inevitably led to the availability of "surplus" lands.

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[3] Hoxie, pp.5-9.

[4] 478 F.2d at 686.

[5] Hoxie, p. 5.

The "surplus lands" concept derived from the relationship of numbers of people to acres of land. The reservations were relatively large and the Indians were relatively few. The prevailing assumption was that 160 acres was the "right" amount of land for one person (Indian or non-Indian) and that more than that could not be "used properly." Thus when each Indian person was allotted 160 acres, some reservation land was necessarily "surplus."

To the reformers it seemed logical that white farmers should take these tracts and farm them, so that they might share their knowledge of sound agricultural practices and provide good examples for Indian farmers. To western politicians the surplus land idea made sense because it gave their constituents new opportunities for prosperity. Thus, the "familiar forces" referred to by the Supreme Court in DeCoteau [6] were constantly bringing pressure to bear on congressional delegations to open Indian lands for settlement.

The period during which the policy of assimilation guided federal programs for Indians can be divided into two segments, according to Dr. Hoxie's analysis.[7] The first segment extended from 1880 to approximately 1895; the second from 1895 to approximately 1920. While assimilation remained the goal, and land allotments remained one of the

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[6] 95 S.Ct. 1086.

[7] Hoxie, pp. 2-20.

specific programs intended to achieve that goal throughout the period from 1880 to 1920, it is urged by government counsel that "... the 'assimilation' process had nuances and subtleties to it that make it clear it was not implemented by Congress or the personnel within the Bureau of Indian Affairs throughout this time period with the same methods or the same expeditious intent."[8] In short, the intentions and methods of policy-makers changed over the years.

Government counsel goes on to assert that a comparison of the two segments of history referred to will reveal, along with the continuity of purpose, a contrast that is critical; specifically: "... a contrast with an important legal significance that was previously not apparent because of the generally incorrect assumption that the congressional intent in passing the Dawes Act of 1887 to encourage expeditious assimilation continued to be the intent of Congress and the Interior Department throughout the remaining history of the assimilation process."[9] The argument, it appears, is that prior judicial decisions in this area have simply been erroneous because the courts have failed to grasp the subtleties and nuances of history now apparent to experts upon more careful examination.

It is alleged that segment II of the campaign for

[8]Memorandum of the United States (hereinafter M.U.S.) at 8.

[9]M.U.S. at 10.

assimilation, as opposed to segment I, was more dominated by westerners who were less reform-minded than the earlier architects of the policy; that segment II was dominated by people who had lost the belief in inevitable human progress and who tended to be pessimistic and cautious; and that these changes in attitudes resulted in a modification of programs. Educational programs were re-oriented toward teaching of vocational skills rather than "civilization." Restrictions on the leasing of Indian allotments were eased. The campaign to extend citizenship was deferred. And, policy-makers during the second segment of the campaign did not envision rapid dissolution of tribal loyalties and tribal organizations, nor did they expect rapid and complete integration of Indians and non-Indians.

Because the campaign for assimilation had not been as "successful" as had been initially expected, it is urged, policy-makers began to operate with the expectation that federal responsibility for law and order, social and educational services, and economic development would continue indefinitely into the future. It is argued, therefore, that federal officials (legislators and administrators) who were policy-makers at the turn of the century, expected that thereafter the federal government, not state governments, would take the responsibility to serve the needs of Indian people, and intended there would be continuing federal

jurisdiction over Indian people. In view of the conclusion that the events on the Cheyenne River Reservation surrounding the passage of the 1908 Act are a "microcosm of the early twentieth century period,"[10] it follows, according to the argument, that Congress could not have intended to and did not intend to reduce the exterior boundaries of the Cheyenne River Indian Reservation.

This argument made by government counsel is relatively creative, and Dr. Hoxie's analysis is somewhat novel, but we cannot accept their conclusions for they simply are not the state of the law.

The government's argument is rejected for the following reasons. First, the areas within which the federal government has dispensed and now dispenses economic and educational benefits to Indians have not been and are not now necessarily co-extensive with the areas within the confines of Indian reservations. See e.g. Morton v. Ruiz. 415 U.S. 199 (1974). Second, responsibility for law and order has not been and is not now limited to reservations, but includes dependent Indian communities and all Indian allotments, the Indian titles to which have not been extinguished. See United States v. Pelican, 232 U.S. 442 (1913) and 18 U.S.C. §1151 (b) and (c). Third, a policy of maintaining tribal organization and a policy of maintaining tribal customs and cultural identity can coexist with a policy of reducing reservation

[10] Hoxie, p. 19.

size or even abolishing reservation status. As the Supreme Court recognized in DeCoteau with respect to the Sisseton-Wahpeton bands:[11]

> ... the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs.

Fourth, the argument asks this Court to assume that the Supreme Court's analysis in Rosebud was shallow, and possibly "erroneous." Fifth, the government would require this Court to deduce the meaning of one particular statute from a general proposition derived from a study of late nineteenth and early twentieth century history even if the result stands in sharp opposition to the legislative history of the statute itself.

If the four decisions of the Supreme Court, to-wit: (1) Seymore v. Superintendent,[12] (2) Mattz v. Arnett,[13] (3) DeCoteau and (4) Rosebud have taught us nothing else at all, these decisions ought to leave no doubt in our minds that the question of whether or not an act of Congress was intended to disestablish an Indian reservation in whole or in part cannot be answered by resort to generalities alone. Indeed, "surrounding circumstances" and "background" have increasingly been recognized as important. But, records of surrounding

[11] 95 S.Ct. at 1094.

[12] 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed. 2d 346 (1962).

[13] 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed. 92 (1973).

circumstances have been used in conjunction with studies of legislative history in order to find the indicia of congressional intent in each particular instance. In no case of this type available to us has any court gathered data about an era of history, adopted a general statement about the policy of the era, and then without relying upon the records of events immediately surrounding the passage of an act, attempted to discern the meaning of the legislation. This is the broad-brush approach at its extreme.

We can and must compare similar statutes passed under similar circumstances, but ultimately: "Each case, of course, must be decided under the applicable statute and upon its own facts."[14] This Court has the task of digging through the records of events preceding the 1908 Act, examining the legislative history of the Act and the Act itself, and finally considering the jurisdictional history of the area. Then, and only then, can we determine whether the Act fits into a pattern or conforms to general statements about historical data.

[14] Erickson, 478 F.2d at 689.

III. THE GAMBLE PROPOSAL AND INSPECTOR McLAUGHLIN'S CONFERENCES WITH THE INDIANS

From the records made available to this Court, it appears that the first official request to open the Cheyenne River Reservation to settlers came from Thomas Downs, an Indian agent who had served on the Cheyenne River Reservation. On November 23, 1907, he wrote to the Commissioner of Indian Affairs about the question of re-leasing Indian lands to the Hansford Land and Cattle Company and stated:[15]

> From my experience while in charge of this Agency, and more especially from the happenings within the past thirty days, I am about convinced that, for the good of the Indians and the country round about, this reservation should be thrown open to settlement as soon as possible. Letter from Special U.S.I. Agent Thomas Downs to the Commissioner of Indian Affairs, November 23, 1907.

The rest of the letter makes it plain that Downs was looking at the whole matter from the standpoint of an official who was charged with carrying out the programs designed to accomplish the goal of assimilation. He thought that his job would have been much easier if white farmers had been settled in the midst of the Indians.

The reply from the Office of Indian Affairs to the Downs letter instructed the Superintendent in charge of the Cheyenne River Agency to convene a meeting of the tribal business council at his earliest convenience in order to consider the question of re-leasing pasture land. The idea

[15] Source: Bureau of Indian Affairs, Letters Received, #93751, 1907, Records Group 75, Nation Archives; see Hoxie, appendix 7.

of pushing for an opening of reservation lands for settlement was rejected with the following statement:[16]

> It has not been the policy of the office, as a rule, to take the initiative in opening Indian lands to public settlement. Until there is some demand by the local community or the country at large it is regarded as the better policy to let the lands remain in a state of reservation. Letter of G. F. Larrabee, Acting Commissioner of Indian Affairs to the Superintendent of the Cheyenne River Agency, December 11, 1907. (Emphasis added.)

Two things of interest can be learned from these letters. First, the Office of Indian Affairs was not pressing for an opening of the reservation. This seems to harmonize with Dr. Hoxie's view of official policy during this period of time. Second, the Acting Commissioner considered an opening to public settlement to be the opposite of letting "the lands remain in a state of reservation." If throwing the lands open to settlement had not been equated in his mind with taking the land out of a reservation status, then the remark quoted, supra, would make no sense.

Obviously, these records of thoughts of an acting commissioner in December of 1907 do not demonstrate conclusively the intent of Congress several months later. They do, however, illustrate the understanding of one official dealing with the Cheyenne River Indian Reservation. It was

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[16] id.

his belief that if the Congress threw open the Cheyenne River Reservation for settlement, then the land thrown open would no longer remain in a state of reservation.

The pressure for opening the Cheyenne River Reservation came from local interests. Exactly when and in what manner these local interests first made their demands for an opening, we do not know. We do know that Senator Robert J. Gamble took their cause to Washington and on December 9, 1907, introduced S. 1385, a bill to authorize the sale and disposition of certain surplus lands on the Cheyenne River Reservation and Standing Rock Reservation in the State of South Dakota.[17] If S. 1385 had been enacted as proposed by Senator Gamble, it would have only opened what was then Schnasse County, or about 350,000 acres in the northwest corner of the Cheyenne River Reservation and the southwest corner of the Standing Rock Reservation.[18] This bill went for consideration to the Senate Committee on Indian Affairs.[19]

On December 20, 1907, Moses E. Clapp, Chairman of the Senate Committee on Indian Affairs, sent a copy of S. 1385 to Frank Pierce, Acting Secretary of the Interior, for comment. Mr. Pierce decided to refrain from making any comment until he

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[17] 42 Cong. Rec. 207 (1907).

[18] See, Hoxie, p. 61 (Figure 3).

[19] 42 Cong. Rec. 207 (1907).

had heard the views of the Indians themselves. On December 26, 1907, the Commissioner of Indian Affairs, at the direction of Mr. Pierce, sent a letter to an experienced Indian Inspector. James McLaughlin, and directed him to proceed to the Cheyenne River and Standing Rock Reservations to lay before the Indians the terms of the enclosed bill (S. 1385) and to solicit their views.[20]

In giving instructions to McLaughlin, Commissioner Leupp called attention to the possibility, suggested by Senator Gamble, that more than just Schnasse County could be included in the negotiations. The instructions to McLaughlin ended with the statement:[21]

> The instructions given you before you conferred with the Rosebud Indians concerning the opening of Tripp County may be followed so far as applicable. Letter from F.E. Leupp, Commissioner of Indian Affairs to James McLaughlin, U.S. Indian Inspector, December 26, 1907.

It was McLaughlin who conferred with the Rosebud Sioux prior to a 1907 Act and thereby reached an agreement with a majority of the adult males that they would cede their claim to lands in that part of the Rosebud Reservation which included Tripp County. Congress chose to disregard the fact that

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[20] See Defendant's Ex. A, Doc. 2. Defendant's counsel and government counsel stipulated to the authenticity of this document, and many others, at the evidentiary hearing on January 9, 1978. This Court was not provided with the source of this document.

[21] id.

three-fourths of the adult males did not agree to the cession, and by use of its plenary power enacted a House Bill which did not incorporate the agreement but did open to settlement the land that had been the subject of negotiations. The instructions under which McLaughlin operated at Rosebud, when he entered into negotiations concerning the land in Tripp County, were instructions to conduct negotiations for a cession of land.[22] At the direction of his superiors he went to the Cheyenne River Reservation with the same instructions in mind.

On December 26, 1907, Acting Secretary Pierce also wrote to Senator Clapp.[23] He asked that Congress defer action on the Gamble bill until McLaughlin could ascertain the desires of the Indians. Mr. Pierce went on to explain the reasoning behind his request in this manner:

> I am induced to follow the course in part by the fact that I have been advised that these Indians may desire to cede a greater area than the bill covers. . . . Letter from Frank Pierce, Acting Secretary of the Interior to Senator Moses E. Clapp, Chairman of the Senate Committee on Indian Affairs, December 26, 1907. (Emphasis added.)

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[22] See the Supreme Court's Opinion in Rosebud, 97 S.Ct. at 1373.

[23] S.Rep. No. 439, 60th Cong. 1st Sess. (1908) at 5. This letter was made a part of S.Rep. No. 439; therefore, citation is made to that report.

It is clear that Acting Secretary Pierce thought the Gamble proposal involved a cession of the lands therein described.

The Indians on the Cheyenne River Reservation soon got word of the Gamble bill. A General Council Meeting was held on the 6th, 7th and 8th of January, 1908. Senator Gamble's bill was read to the council. The General Council did not like it and requested their Business Council to write a letter to the Indian Rights Association to ask that organization to use its influence to stay congressional action.[24]

Mr. McLaughlin went first to Fort Yates, North Dakota, to confer with the Indians of the Standing Rock Reservation. The conference began on March 9, 1908, and ended late on March 10, 1908. A transcript of the discourse of Inspector McLaughlin, and the statements of the Indians in response to his questions and suggestions is available to us.[25]

Chief Justice Dunn of the South Dakota Supreme Court made many references to this conference and also quoted extensively from the transcript in his opinion in Stankey v.

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[24]Proceedings of General Council of the Cheyenne River Sioux Tribe, January 6, 7 and 8, 1908 at White Horse, South Dakota. Source: General Correspondence, Cheyenne River, file 054, Records Group 75, National Archives; Hoxie, appendix 32.

[25]The record of this conference was later made part of S.Rep. No. 439, supra, and also was made a part of H.R. Rep. No. 1539, 60th Cong. 1st Sess. (1908).

Waddell, supra. The attorneys for the United States have taken issue with Chief Justice Dunn's use of this material, and have stated that they think he used it erroneously either through "lack of precision" or "inadvertence" in his opinion pertaining to the Cheyenne River Indian Reservation.[26] In the view of the attorneys for the United States, this use of historical materials by Chief Justice Dunn is "... the inevitable consequence of casually 'lumping' together materials affecting diverse tribes and reservations; a practice followed by those seeking to cloud the issue."[27] Such a view by said United States attorneys is unfortunate and uninformed.

This Court agrees with the approach taken by Chief Justice Dunn. Certainly, when a reservation diminishment question is presented, the specific act that is alleged to have brought about the diminishment must be examined with care; that act and no other is controlling; and no broad-brush approach is to be used. But, in this situation, Chief Justice Dunn's use of the historical material is hardly a broad-brush approach or an irresponsible commingling of records referring to "diverse tribes and reservations."

Nobody disputes the fact that before 1908 the Standing Rock Reservation and the Cheyenne River Reservation adjoined one another. The same Act that opened the Standing Rock Reservation for settlement in 1908 also opened the Cheyenne

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[26]M.U.S. at 7, n. 6.

[27]id.

River Reservation. That single Act was preceded by House and Senate Committee reports[28] that included a letter from Inspector McLaughlin pertaining to both reservations and the transcripts from the conferences with the Indians at both reservations.

No reasonable person could conclude under these circumstances that Congress manifested one particular intent when dealing with the Standing Rock Reservation and a contrary intent when dealing with the Cheyenne River Reservation in this one Act. Therefore, the records of the conference which Inspector McLaughlin had with the Indians at Fort Yates are important to an understanding of the intent of Congress with reference to the Cheyenne River Reservation.

Restating everything set out by Chief Justice Dunn in Stankey v. Waddell would be of no benefit. Several points, however, merit renewed consideration.

Both Inspector McLaughlin and the Indians assembled at Fort Yates were well aware of the Lone Wolf[29] decision. In fact, the Inspector began the discussion with an exposition

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[28] S.Rep. No. 439, part 2, supra, and H.R. Rep. No. 1539, supra.

[29] Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903) wherein the Supreme Court held that Congress had the power to abrogate provisions of a treaty between the United States and the Indians.

of the meaning of that case. The Indians understood that no agreement binding on Congress would be reached, and were aware of the hard political realities of the time. Inspector McLaughlin read and explained not only the provisions of the Gamble bill (which pertained only to Schnasse County), but he also explained the provisions of a bill that had been introduced by Congressman Marshall of North Dakota. The latter would have opened the whole Standing Rock Reservation to settlement. Inspector McLaughlin was convinced that the Congress would pass some bill that would affect more than Schnasse County.

In this context, where Congress was about to enact legislation pressed upon it by "familiar forces," Inspector McLaughlin urged the Indians to agree upon a plan that was somewhere between the Marshall bill and the Gamble bill; his own words at this point are informative:

> My friends, as I have before stated, I am not here of my own volition, but sent here by my superiors to present this matter to you and explain it clearly, so that you may understand what is contemplated by these bills which have been introduced in Congress and which are liable to become a law during the present session of that body unless you meet the question with some reasonable proposition that may meet with Departmental approval and be acceptable to Congress.
>
> I know how dear reservations are held by the respective Indian tribes occupying them

and how they wish to hold them intact. This is but natural, and were it in my power to have them undisturbed as they now exist I would cheerfully cooperate in having them remain so, did I deem it best for the Indians; but that is impossible, my friends. . . .

Anticipating what is likely to be brought about in this respect, the Secretary of the Interior and Commissioner of Indian Affairs are exceedingly desirous in protecting the Indians and to obtain for them the best terms possible for their surplus lands in the legislation enacted by Congress for their opening.

In the past I favored Indian reservations being held intact, but from observation I have changed my mind as to that and now believe that it will be manifestly better for the Indians to have their surplus lands opened, as it brings in white settlers among them, from whom the Indians may more readily acquire the white man's civilization and industrious habits, and it also provides a better market for the products raised by the Indians.

To meet this question you must prepare for it by consenting to some compromise between these two bills, such as may be accepted as a modification of the more drastic measure contemplated by the Marshall bill, which would open all of the surplus lands of your reservation after allotments were completed.

You have a very large reservation, certainly much greater than you need and much greater than you will be privileged to hold, and I now wish to hear from you regarding the matter which I have so carefully explained. Statement of James McLaughlin, U. S. Indian Inspector, at council meeting held at the Standing Rock Agency, March 9, 1908.[30]

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[30]S.Rep. No. 439, part 2, supra, at 5 and 6; H.R.Rep. No. 1539, supra, at 9, 10.

With the words heretofore quoted, Inspector McLaughlin adjourned the meeting until the next morning so that the Indians would have time to discuss the matter among themselves.

The meeting was reconvened the next day, much later than scheduled at the request of the Indians. One of the spokesmen for the Indians, Arthur Tibbets, reported:

> We have decided here in council to draw a line showing the land we are willing to cede. We have decided to give up 29 townships. That is what was considered and finished last night. Statement of Arthur Tibbets at council meeting at Standing Rock Agency, March 10, 1908.[31]

The Indians were intent on keeping the area likely to be affected by congressional action as small as possible.

In the dialogue that then ensued between Inspector McLaughlin and the Indians, references are constantly made to maps and boundaries. The whole discussion appears to this Court to have been based upon a mutually understood proposition; namely, that the boundaries of the Standing Rock Reservation would be altered by the Gamble bill. A serious study of this case requires an examination of each page of the dialogue which has been preserved in the committee reports. Some statements are particularly enlightening:

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[31]S.Rep. No. 439, part 2, supra, at 7; H.R. Rep. No. 1539, supra, at 11.

McLAUGHLIN: Now, my friends, as to the lines which I have marked on this map in blue pencil for you to relinquish, if every Indian on this reservation were to receive an allotment within the dimin. shed reservation it would still leave you about 500,000 acres of surplus land, and as there are a great many of your people allotted in the tract that will be ceded, you will therefore have a great many acres of surplus land within your diminished reservation.

The Marshall bill gives you permission to select any lands you may wish in the portion to be ceded, or those who are allotted there may relinquish if they so desire and come within the diminished reservation. This matter is for yourselves to determine, and you will have at least a year and a half or two years before the reservation will be opened. . . .[32]

The reason I am speaking to you with such confidence as to being able to hold the suggested diminished reservation is because I feel that I will have the Secretary and the Commissioner with me in the matter when I submit my report, providing this blue line is adopted. It would be so much better for you to concur in this inner line than to have it taken from you anyway, which I feel quite sure Congress will do and it will be a great satisfaction to you to be a party to the agreement instead of having it taken from you. It is only a matter of two rows of townships more than you propose and it leaves you ample surplus lands for all the stock you will ever possess....

THOMAS FROSTED: . . . There is great danger in the way we have agreed to relinquish a portion of our reservation, which differs from the way the Congress

[32] S.Rep. No. 439, part 2, supra, at 10; H.R.Rep. No. 1539, supra, at 12.

desires, and now, while we have the opportunity, let us try to meet the two propositions halfway. The decision will be with Congress anyhow, and while we have a chance it would be a good thing for us to consider some way in which we may compromise the two bills.

It would be worth while for us to come to some satisfactory agreement whereby we can save a larger portion of our reservation, and in doing this we must try and consider what is desired by Congress....

If we were to take one step toward the line proposed by the Congressional committee we would be better satisfied and not sorry for the step we had thus taken. In compromising the two bills that have been laid before us we would feel that we were on a solid basis so as to save a larger portion of our reservation. Statements made at Council Meeting at Standing Rock Agency, March 10, 1908.[33]

These excerpts from the dialogue are not quoted for the purpose of proving that an agreement was reached at Fort Yates. Rather, these excerpts illustrate the commonly understood meaning of the bill that later became law. As such, they are part of the surrounding circumstances which the Court may consider under the law as announced in Rosebud.

From Fort Yates, Inspector McLaughlin traveled to the Cheyenne River Agency in South Dakota where a council meeting was convened on March 16, 1908. The Agent in charge had been ordered to have the Indians assembled for the conference.

[33] S.Rep. no 439, part 2, supra, at 10, 12, 13; H.R.Rep. No. 1539, supra, at 12, 16, 17.

Relatively few were in attendance due to inclement weather and bad roads.

The Inspector again discussed the Lone Wolf case and its implications. Thereafter, he read and explained two bills, in this case the Gamble bill and a bill introduced by Congressman Hall of South Dakota.[34]

The Inspector then forthrightly told the Indians essentially what he had told the people at Fort Yates. In his own words:

> I would suggest that you consider the provisions of both these bills carefully and in a business-like manner. Agree among yourselves upon some compromise measure between the two bills which may receive the approval of the Department and be acceptable to Congress.
>
> Determine upon how much, and what portion, of your reservation you are willing to relinquish; also as to the manner of payment, which, however, must be in accordance with the general provisions of the said bills. . . .
>
> I was for many years in favor of leaving the boundaries of Indian reservations undisturbed; but results of the system have caused me to change my mind relative to same, and I now believe, even if such were possible, that large reservations for Indians, much of which is not occupied by them, is not for the best interests of the Indian occupants. I now believe that it will be manifestly better for the Indians to have their surplus lands opened to settlement, as it brings in white settlers among them, from whom the Indians may more readily acquire the white man's civilization and industrious habits, and it insures a home market for all products raised by the Indians. Statement made at meeting with the Indians at the Cheyenne River Agency, March 16, 1908.[35]

[34] Congressman Hall's bill was analogous to Congressman Marshall's bill and would have opened all of the Cheyenne River Reservation for settlement

[35] S.Rep. 439,part 2,supra, at 18, 19; H.R.Rep. No. 1539 supra, at 22, 23.

Inspector Mclaughlin then adjourned to let the Indians have time to confer, but not without protest from James Crow Feather, Chairman of the Council. Crow Feather was opposed to hasty action on a topic of such importance; moreover, he was concerned that many Indian people had been unable to get to the conference. Crow Feather wanted to limit the discussion to the question of whether or not a council meeting should be held to consider the tribe's reaction to the pending legislation.

Nevertheless, the meeting was reconvened at 7:30 p.m. the same day. Inspector McLaughlin reminded the assemblage that Congress could do as it pleased without asking; he gave as examples the cases with the Blackfoot and Flathead reservations in Montana. He then pressed hard for an opinion from the group. In so doing, he praised the "wisdom" of the people on the Standing Rock Reservation with these words:

> After I explained the matter to the Standing Rock people very fully they saw the wisdom of meeting the wishes of Congress in a very reasonable manner, by which I am quite confident that they will have a diminished reservation created, which will remain so for many years, and it will enable them to have allotments for the children born to them for many years to come. Statement at meeting at Cheyenne River Agency, March 16, 1908.[36]

James Crow Feather again asked for more time. Inspector McLaughlin changed the subject. Provisions of the proposed

[36] S.Rep. No. 439, part 2, supra, at 20; H.R. Rep. No. 1539, supra, at 24.

legislation respecting the method of payment and the amount to be paid by the federal government for school lands were discussed.

At one point a member of the group, Allen Fielder, spoke up and stated:

> You have told us today that the members from our State have bills in Congress to open up a part or all of our reservation. We heard this some time ago. A good many of us have had that thought in mind and we have thought over the matter. I am in favor of our opening the reservation and don't think there is any use in our trying to fight it.
>
> I am in favor of opening only part of it; we want to reserve some for the future, a diminished reservation. . . . Statement at meeting at Cheyenne River Agency, March 16, 1908.[37]

Again, and we emphasize this, we did not scrutinize the record of that meeting of March 12, 1910, for evidence of an agreement, and we did not choose certain quotations to prove the existence of any agreement. There was no agreement in this instance. Certain statements were taken from the record to demonstrate what this Court believes is an inescapable conclusion; namely, that the operating assumption upon which all of Inspector McLaughlin's discussions with the Standing Rock and Cheyenne River people were based was the assumption that the Gamble bill and other pending legislation, if passed, would diminish or reduce the size of

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[37] S.Rep. No. 439, part 2, supra, at 22; H.R. Rep. No. 1539, supra, at 26.

the reservations involved and necessarily alter reservation boundaries. Moreover, it was assumed in the official correspondence and the conferences with the Indians that a cession of land was under consideration.

To maintain that the Inspector, other Department of Interior officials and the Indians had in mind an eventual sale of scattered pieces of real estate which would not affect the reservation boundaries, while keeping the evidence in mind, requires extraordinary mental gymnastics. One must assume that Inspector McLaughlin traveled to Fort Yates and the Cheyenne River Agency under the instructions previously given him in preparation for discussions with the Rosebud Reservation Sioux concerning Tripp County; but that he, and the Indians at the Standing Rock and Cheyenne River Reservations with whom he entered into discussions, operated with a markedly different idea of what the effect of pending legislation would be than was the case at Rosebud. One must assume that the Acting Secretary of Interior and lesser officials in the Department of Interior were either extremely careless or hopelessly confused in using the word "cede" and making reference to land being in a "state of reservation." Finally, one must go on to assume that both McLaughlin and the spokesmen for the Indians used the expressions: "diminish," "reduce," "diminished reservation," "relinquish," "cede" and the like, in conjunction with the use of maps showing the outline

of what a proposed "diminished reservation" would look like, without really intending to convey the idea that the pending legislation would change reservation boundaries.

This Court is well satisfied that Inspector McLaughlin in his own mind thought the Gamble bill would change the boundaries of the Cheyenne River Reservation if it became law. This Court is likewise well satisfied that this understanding of Inspector McLaughlin's was shared by other persons in the Interior Department of the time, and that this idea was conveyed to the Indians assembled at Fort Yates and the Cheyenne River Agency in March of 1908. But, the Inspector's thoughts and officials' assumptions are not congressional intent. Thus the significant question is whether or not Congress intended to do what these officials assumed Congress intended to do.

IV. INSPECTOR McLAUGHLIN'S REPORTS AND THE LEGISLATIVE HISTORY OF S. 1385

On March 12, 1908, Inspector McLaughlin sent the Secretary of the Interior a preliminary report of his conferences with the Indians of the Standing Rock Reservation.[38] On March 30, 1908, Inspector McLaughlin, now in Washington, D.C., submitted a complete report of the conferences with the Indians of the Standing Rock and Cheyenne River Reservations to the Secretary of the Interior.[39] With this report he submitted two attachments; attachment one was a transcript of the conference which he had with the Indians at Fort Yates; attachment two was a transcript of the meeting at the Cheyenne River Agency.

The report to the Secretary of the Interior advanced the idea that the compromise position which McLaughlin had put before the Indians was a plan generally acceptable to the majority of them. Several statements made by the Inspector in the letter tend to reveal his ideas relative to the effect of the legislation which he recommended. He stated with reference to his conference with the Standing Rock Indians:

> After a careful study of the proposed legislation, and being quite familiar with the conditions prevailing in the Standing Rock and Cheyenne River reservations, and

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[38] Defendant's Ex. A, Doc. 3A. Counsel stipulated to the authenticity of the document, but the source was not made known to the court.

[39] S.Rep. No. 439, part 2, supra, at 1-4.

also knowing that the area of these two reservations was much greater than the Indians can make proper use of, and that the opening of some of the surplus lands is demanded in the development of that section of the country, I deemed it best to submit a definite proposition as to the tract I thought the Indians should relinquish, and therefore suggested that they relinquish all the surplus lands of their reservation lying west of the line dividing ranges 23 and 24 in South Dakota and ranges 84 and 85 in North Dakota, together with one tier of townships lying along the southern boundary of their reservation, after allotments to those entitled thereto have been completed.

In order that the Indians might fully understand the boundaries of the proposed diminished reservation I indicated with a blue pencil on a map of South Dakota the area which I believed would be to the best interests of the Indians to relinquish, which map I transmit herewith (Exhibit No. 3). The area indicated by blue-pencil line on said map was clearly explained to the Standing Rock Indians, as may be seen by reference to pages 4 to 17, inclusive, of the council minutes (Exhibit No. 1). Letter of Inspector McLaughlin to the Secretary of the Interior, March 30, 1908.

With reference to his conference with the Cheyenne River Indians, he stated:

> . . . I explained the said Senate and House bills with reference to opening the surplus lands of the Cheyenne River Reservation, as shown by the minutes of the council, transmitted herewith (Exhibit No. 2), and it will be seen from said minutes--pages 17 to 24, inclusive--that the Indians realized it would be advisable for them to consent to the opening of a portion of their surplus lands with the hope of thereby securing a diminished reservation. Letter of Inspector McLaughlin to the Secretary of Interior, March 30, 1908.

Upon a careful reading of the transcripts attached to the letter, a reader might differ with the Inspector as to his assessment of the "general sentiment" of the Indians assembled at the Cheyenne River Agency. It is plain, however, that the Inspector communicated to his superiors after the conferences the same operating assumption which we found to exist in the conferences themselves: namely, that the legislation being considered would alter reservation boundaries.

On March 30, 1908, F. E. Leupp, Commissioner of Indian Affairs, wrote to Senator Gamble.[40] The first paragraph of the letter indicates that it was intended as the comment which was solicited back on December 20, 1907, by Moses E. Clapp, then Chairman of the Committee on Indian Affairs. The letter refers to amendments which had been made to the original Gamble bill "to meet the views of the Indians of these reservations as to the form of legislation which should be enacted and the lands to be opened."[41] It appears that Commissioner Leupp relied upon (or at least acted in harmony with) the conclusions transmitted in McLaughlin's report and recommended to the Senate Committee that a bill midway between the original Gamble proposal and the two house bills which would have opened all of both reservations.

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[40] S.Rep. No. 439, supra, at 5.

[41] id.

The Commissioner also asked the committee to consider further amendments to appropriate more money in order that it might be possible to, among other things, make a payment of $2.50 per acre for the 166,000 acres which would be granted to the states for school purposes. He also asked for the authority to cause the lands involved to be examined by experts of the Geological Survey, and for authority to reserve coal lands, if any, for the benefit of the tribes.

On April 1, 1908, the Senate Committee on Indian Affairs submitted the report to which we have heretofore referred. S.Rep. No. 439, 60th Cong., 1st Sess. (1908). The Committee recommended a bill that encompassed more land than the original Gamble proposal. The Commissioner's recommendation as to survey of coal lands was incorporated. The report, in its concluding paragraphs, contained these words:

> The bill was prepared after full conference with the Commissioner of Indian Affairs and the Secretary of the Interior. The area covered by the provisions of the original bill was intended only as tentative. Certain other provisions were embodied, but it was expected it would be necessary that modifications would be made and these so as to comply as nearly as might be with the wishes of the Indians on the two reservations. It was the purpose to ask of the Indians consent to a relinquishment of all the surplus and unallotted lands upon both reservations that were not necessary for their use and occupation. . . .
>
> The lands reserved for the use of the Indians upon both reservations as diminished, in the opinion of your committee and of the Department, are ample and more than sufficient for

> the present and future needs of the Indians of the respective tribes. . . .
>
> It is hoped, should the bill become a law and the lands opened as is proposed, other railways will be extended west of the Missouri River through the lands opened to settlement, which will lead to a rapid development of the northwestern section of the State of South Dakota and greatly benefit the Indians not only upon the lands opened to settlement, but also the holdings of the Indians upon the reduced reservations. S.Rep. 439, supra, at 3, 4 and 5.

Submitted along with the report and expressly made a part of the report were two letters, the first being the letter of Acting Secretary Pierce to Senator Clapp to which we have referred previously; and the second being Commissioner Leupp's letter to the Senate Committee to which we have also referred.

On April 15, 1908, a supplemental report was submitted by the Senate Committee on Indian Affairs. It consisted of Inspector McLaughlin's letter of March 30, 1908, to the Secretary of the Interior from which we have taken quotations as well as the transcripts of the Inspector's meetings with the Indians from which we have quoted even more extensively.

At this juncture let us consider what has heretofore been established. We have traced the idea of opening the Cheyenne River Reservation from its inception in the autumn of 1907, through the conferences between Inspector McLaughlin and the Indians up to the point where on April 15, 1908 a

Supplemental Report comes out of the Senate Committee on Indian Affairs. We have, we believe, discovered that the ideas of diminishment, reduction, and a change of the boundaries of the reservations to be affected were operating assumptions of everyone involved in the discussions. The important point is that the pertinent correspondence and the records of the pertinent discussions were expressly made a part of the Senate Report that accompanied Gamble's proposal (S. 1385) out of the Senate Committee on Indian Affairs. Thus, the Senate Committee carried forth into the Senate itself the records that contain the operating assumption upon which correspondence and discussions were based--namely, that passage of the Gamble bill would alter the boundaries of the Cheyenne River Reservation and the Standing Rock Reservation.

As stated earlier, Inspector McLaughlin's thoughts are not to be equated with congressional intent, but here we have McLaughlin's statements expressly incorporated into and made a part of a Senate Committee's report. That committee report, all of it, is essential to ascertaining congressional intent. Judges have differed about the value to be assigned to various documents that precede the enactment of a law, but even the more cautious judges have admitted the importance of committee reports.[42] And, in both

[42] See, e.g. Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 395-396 (1950).

Rosebud and DeCoteau the Supreme Court examined committee reports to ascertain the intent of Congress.

On April 15, 1908, S. 1385 came to the floor of the Senate.[43] The amendments recommended by the Senate Committee on Indian Affairs were agreed to, and additionally the Senate accepted an amendment proposed on the floor by Senator Gamble which amendment gave Indians residing on allotments in certain townships the right to use timber from certain lands as long as those lands remained within the public domain. Without debate the bill was passed.[44] Thus, the bill which had been introduced on December 9, 1907 to open Schnasse County went off to the House as an act passed by the Senate to open approximately fifty (50) townships in North and South Dakota.

The House Committee on Indian Affairs speedily considered the Act. On April 20, 1908, the Committee reported favorably on the bill passed by the Senate and recommended that the same be passed by the House with minor amendments.[45] The House Committee on Indian Affairs specifically adopted portions of Senate Report No. 439 as well as part 2 of said report which consisted of McLaughlin's letter of March 30, 1908, to the Secretary of the Interior and the transcripts of McLaughlin's conferences with the Indians. Thus, the records reflecting McLaughlin's understanding of this legislation were not only made available to the House

[43] 42 Cong. Rec. 4753 (1908).

[44] 42 Cong. Rec. 4755 (1908).

[45] H.R.Rep.No. 1539, 60th Cong., 1st Sess. (1908).

Committee, but were incorporated by that committee into its official report. It appears that the House Committee on Indian Affairs shared the same operating assumption as McLaughlin and his superiors in the Interior Department: namely, that the passage of S. 1385 would leave the Indians of the Cheyenne Reservation with a diminished reservation in the sense that the geographical area within the reservation boundaries would be reduced.

On May 26, 1908, S. 1385 came to the floor of the House and after the bill was read a debate ensued.[46] The substance of the debate concerned the monetary aspects of the Gamble bill. Some Congressmen favored giving only $1.25 per acre for school lands and others favored giving more. Some Congressmen favored a method of payment for lands bought by settlers that would force settlers to bid the going rate after opening; others favored the idea of having the land appraised. As far as we can see, nothing in this House debate touched explicitly on the question of diminishment or reduction of reservation size.

Yet, the House debate makes sense only in light of an assumption that the lands to be opened would be returned to the public domain by the provisions of the Gamble bill. When the value of the land was being discussed,

[46] 42 Cong. Rec. 7004 (1908).

the following statement was made by Congressman Sherman of New York:

> . . . Now the bill further provides for a transfer to the States of North and South Dakota of sections 16 and 36 in each township. The enabling act of those two States provided that the United States should eventually cede such sections to the states, respectively, for school purposes. We make appropriation herein for payment to the Indians for the land thus taken. That will amount to something like 160,000 acres.[47]

This aspect of the House debate will be discussed at greater length later in conjunction with a consideration of one section of the Act. However, it should be noted that Congressman Sherman's reference to the enabling act in this context must have rested on an assumption that the provisions of the Act which granted sections 16 and 36 of each township to the States constituted an implementation of the grant contained in the enabling act by which North and South Dakota entered the Union.

The House sent the bill, as amended, over to the Senate. Minor House amendments were accepted in the Senate without debate.[48] President Roosevelt signed the Act and it became law on May 29, 1908.

It appears that neither the Senate nor the House at any time debated the specific question of which governmental entity

[47] id at 7005

[48] 42 Cong. Rec. 7018 (1908).

would have jurisdiction over the area to be opened by S. 1385. It appears further that the matter was not discussed by any committee or at least no one deemed it necessary to put the matter into a committee report if it was discussed. That is not surprising. If our analysis is correct, it was an assumption shared by all that S. 1385 would diminish the Cheyenne River and Standing Rock Reservations and that lands outside of the diminished reservations, which had not been allotted, would become part of the public domain. When settlers moved in and paid for their quarter sections, title to the land would be transferred in fee to settlers and the power to govern opened areas would lie with the States.

Reaction among the local interests in central South Dakota to the passage of the Gamble bill was unrestrained exuberance.[49] The lands opened to "civilization" were said to contain resources that could be given no "adequate description."[50]

The Indian people of the Cheyenne River Reservation, some of them at least, must have been plainly disgusted. Despite the fact that they had sent a delegation to Washington in the hope of keeping Congress from passing any bill that

[49]Hoxie, p. 57.

[50]Reference is to an article from the Daily Capitol Journal, Pierre, South Dakota, June 4, 1908.

pertained to more than Schnasse County,[51] the Congress had acted unilaterally to open about one-half of their reservation to settlement. Dr. Hoxie is no doubt correct when he concludes with reference to the congressmen who passed the Gamble bill that "... the speed with which the 'Schnasse County opening' was expanded, and the fact that so few Indians were consulted reduce any suggestion that they acted for the tribe to the level of a cruel joke."[52]

Disgust and bitterness lingered. The excerpt from a letter from an agent at the Cheyenne River Agency to the Commissioner of Indian Affairs in 1909 set out in Dr. Hoxie's analysis is evidence of this. The letter is also informative on another point as the excerpt illustrates:

> It appears that the people of this reservation cannot become reconciled to the idea that they did not have proper voice in the recent ceding of the lands of this reservation to the United States. I have taken special pains to explain how matters of this kind are accomplished, that the initiative is taken by Congress; that the action of Congress is final and the law must be obeyed.... (Emphasis added.)[53]

In the year after the passage of the 1908 Act and before the actual opening for settlement, it was the assumption of an agent working on the Cheyenne River Reservation that a

[51]Hoxie, p. 55.

[52]Hoxie, p. 56.

[53]Hoxie, p. 58, quoting from letter of L. F. Michael to Commissioner of Indian Affairs, August 2, 1909, General Correspondence, Cheyenne River, file 054, Records Group 75, National Archives.

PAGE 45 OF THIS OPINION
WAS NOT ON FILE WITH THE
COURT. THE FULL OPINION,
HOWEVER, MAY BE FOUND AT
453 F. SUPP. 1171.

intent to accomplish what Inspector McLaughlin and other officials thought it would accomplish. We cannot pierce the minds of the legislators working back in 1908 to ascertain with certainty what their private thoughts were about this legislation. All we can do is examine the records for objective manifestations of congressional intent. In the judgment of this Court, the indicia of congressional intent that can be extracted from the records from the weeks immediately preceding the enactment of S. 1385 point unmistakably in one direction: Congress intended to diminish the size of the Cheyenne River Indian Reservation by altering its boundaries.

The inquiry is, of course, by no means complete, for the task of the Court is not simply to read legislative history, but to construe the Act in light of the legislative history. Additionally, the Court must be mindful of the canon of construction which requires that doubtful or ambiguous expressions are to be interpreted for the benefit of the Indians. This Court must examine the Act of 1908 and determine whether or not, in light of the legislative history and surrounding circumstances, the terms of the Act are unclear and whether or not the meaning of the Act with respect to the diminishment question is ambiguous.

V. THE 1908 ACT

A. Section 2 and its proviso.

The Act[56] is entitled:

> An Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect.

Section 1, containing the operative language of the Act, reads as follows:

> . . . That the Secretary of the Interior be, and is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota....

Section 2 contains the oft-quoted proviso which states:

> That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof an allotment anywhere within the respective reservations thus diminished to which reservation the said Indians may belong. §2, 35 Stat. 460 (1908) (Emphasis ours.)

The term "reservations thus diminished" could mean two things.[57] It could mean that the amount of land belonging to the Indians after the opening would be less than before

[56] The text of the 1908 Act was included as an appendix in Stankey v. Waddell, 256 N.W. 2d at 127.

[57] 478 F.2d at 687.

even though the reservation boundaries were the same; it could also mean that the reservation boundaries were changed and the reservation thereby reduced in size. The question is whether or not in the light of legislative history this term is reasonably susceptible of more than one construction. We conclude that it is not for several reasons.

1. The records of Inspector McLaughlin's conferences with the Indians are filled with references to boundaries, and the changes in boundaries that would result from the compromise legislation which the Inspector urged the Indians to accept. Congress was aware of this.

2. The records indicate that Inspector McLaughlin and others conceived of the Gamble bill as a proposal that would result in a cession of land. As Justice Rehnquist acknowledged in Rosebud, the word "cession" in strict English usage implies a bilateral agreement. 97 S.Ct. 1368. Given the holding of Lone Wolf v. Hitchcock, 187 U.S. 565 (1903), Congress was not obliged to enter into a bilateral agreement with the Cheyenne River people in order to open land for settlement; Congress could act unilaterally. Thus, by using the word "cession," Inspector McLaughlin and others may have envisioned a bilateral agreement or they may have had in mind a unilateral action by Congress; that is really immaterial. The point is that "cession" is a word that refers to the transfer of territory from one sovereignty to

another, and was thus construed in Rosebud.

In Rosebud the Supreme Court found that the word "cede" used in conjunction with "grant," "surrender" and "convey" was "precisely" suited to disestablishment.[58] Thus the technical misuse of the word was not allowed to cloud its essential meaning and did not "... make the meaning of the Act ambiguous as between diminution of the reservation boundaries on the one hand, and merely opening up designated lands for settlement by non-Indians, on the other."[59]

In the correspondence preceding this 1908 Act pertaining to the Cheyenne River Indian Reservation, the word "cession" appears frequently. In his letter to the Secretary of the Interior on March 30, 1908, Inspector McLaughlin, making reference to his discussions with the Standing Rock Tribe, stated:[60]

> After the four speakers had expressed themselves in favor of relinquishing but twenty-nine townships of land, I stated my views very clearly as to the various phases of the question under consideration, whereupon Thomas Frosted, one of the four said spokesmen for the council, expressed his individual views, favoring the opening of the tract indicated in blue pencil on the inclosed map, and he was followed by Siaka, one of the leading Indians on the reservation, who also strongly spoke in favor of the cession thus indicated. (Emphasis added.)

[58] 97 S.Ct. 1368 (citing DeCoteau).

[59] id.

[60] S.Rep. No. 439, part 2, supra, at 2; H.R. Rep. No. 1539, supra, at 6.

With reference to his conversations with the Indians at the Cheyenne River Agency, the Inspector stated:[61]

> During the time our council was in session at the agency a council was also being held at the Cherry Creek Substation, 90 miles southwest of the agency, and H. N. Crouse, farmer in charge of that station, phoned to me that afternoon (the 16th instant) that the Indians of the Cherry Creek district, then in council, had decided by a vote of 39-19 - being 2 to 1 - to relinquish a part of their reservation, and that 27 had voted to have the cession embrace the northern part of the reservation, and twenty voted to have the cession taken from the west and north in about equal quantities. (Emphasis added.)

Inspector McLaughlin thought he was discussing pending legislation that would involve a "cession." And the "cession" assuredly did not refer to possible future sales of 160 acre plots to farmers. The use of the word "cession" in conjunction with the constant references to boundary lines leaves no room for reasonable doubt that the Inspector himself viewed the Gamble bill as legislation which would change the outlines of the reservation itself. The use of the word "diminish" and its derivatives appears repeatedly in this context. That being the case, "reservation thus diminished" on the face of the act cannot reasonably refer merely to amounts of land owned by Indian persons unless the meaning of the phrase is completely divorced from its meaning in the Inspector's discussions which were incorporated into

[61] S.Rep. No. 439, part 2, supra, at 3; H.R. Rep. No. 1539, supra at 7.

the legislative history.

One cannot maintain the position that the phrase "reservation thus diminished" can reasonably be construed to mean sales of reservation lands to outsiders, and simultaneously take the legislative history in this case seriously. It is an "either-or" proposition. Either we accept the fact that Congress intended the same thing here as in the acts construed in Rosebud or we ignore the legislative history insofar as it incorporated correspondence that contains numerous references to a "cession" that would result from pending legislation.

3. The acreage calculations of the legislators who passed the Act make sense only if the Cheyenne River Reservation was diminished in a geographical sense. Before the 1908 Act the Standing Rock and Cheyenne River Reservations contained approximately five and one-fourth million acres.[62] The 1908 Act opened about one-half of the two reservations for settlement; approximately 1,728,000 acres were opened on the Cheyenne River Reservation and approximately 1,244,160 acres were opened on the Standing Rock Reservation.[63] The Senate report to which we have repeatedly referred (S.Rep. No. 439), after stating the acreages to be opened, goes on to state as follows:[64]

[62] 42 Cong. 7004 (1908).

[63] S.Rep. No. 439, supra, at 4.

[64] id.

> Should the bill become a law it will leave to the Indians on the Standing Rock Reservation about 1,250,000 acres and to the Indians upon the Cheyenne River Reservation about 1,150,000, which is exclusive of any allotments now taken or which may hereafter be taken prior to the opening of the lands to settlement in the area to be opened. The lands reserved for the use of the Indians upon both reservations as diminished, in the opinion of your committee and of the Department, are ample and more than sufficient for the present and future needs of the Indians of the respective tribes. (Emphasis added.)

The acreages left to the Indians of the respective tribes as "diminished reservations" would not correspond to the figures here stated if the allotments in the area to be opened had been counted. In view of these figures, the only way one could logically conclude that "diminish" somehow refers to reducing the total amount of land held by Indians as opposed to reducing the size of the reservations is to assume that the Senators and Representatives were speculating that the acreages within the unopened area would someday be transferred to non-Indians in an amount equal to Indian allotments in the opened portion. The unlikelihood of this possibility is immediately obvious; moreover, the quotation from the Senate report refers to the acreages as "exclusive of any allotments now taken or which may hereafter be taken prior to the opening of the lands to settlement in the area to be opened."

The report is clear and convincing. In order to leave open the possibility that the term "reservations thus diminished" on the face of the Act refers to quantities of land lost by sale to outsiders, instead of diminution of reservation boundaries, one must disregard Senate Rep. No. 439, supra.

4. We have noted the fact that the Senate Committee on Indian Affairs submitted, as a supplemental report, the letter of Inspector James McLaughlin of March 30, 1908 to the Secretary of the Interior, which letter reported the results of his conferences with the Indians at Fort Yates and Cheyenne River. We have also emphasized that this letter and the two exhibits attached thereto became part 2 of Senate Rep. No. 439, 60th Cong. 1st Sess. (1908) and that the letter and the exhibits were also made a part of H.R. Rep. No. 1539, 60th Cong. 1st Sess. (1908).

In explaining the effect of the compromise legislation which the Commissioner of Indian Affairs favored, Inspector McLaughlin stated:[65]

> The opening of the tracts as outlined in blue pencil on the inclosed map would segregate the Standing Rock and Cheyenne River reservations by opening a strip 18 miles in width between them, and give to each of said agencies legal subdivision outboundaries and compact diminished reservations... and I am strongly of the opinion that the lines thus suggested would be for the ultimate best interests of the Indians. (Emphasis added.)

[65] S.Rep. No. 439, part 2, supra, at 3.

This Court cannot comprehend how the two reservations that had adjoined one another could be segregated and how there could be a strip of land between them without altering reservation boundaries. This Court likewise cannot comprehend how the effect of the bill, if passed, could be to create "compact diminished reservations" without altering reservation boundaries.

These reports contain material that is clear and convincing. We are back to the same old dilemma. Either "reservations thus diminished" in the 1908 Act referred to reservations with changed boundaries or the term in the Act had a meaning at variance with the meaning of the key word "diminished" in the committee reports. We either accept the proposition that Congress intended to alter the reservations' boundaries or we assert that the congressional intent cannot be deduced from these committee reports. There is no other reasonable option available.

B. Section 7 and the Enabling Act.

Section 7 of the 1908 Act states:

> That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement. (Emphasis added.)

The significance of a grant of two sections of every township (or sections in lieu thereof) was explained by Justice Rehnquist in Rosebud. When North Dakota and South Dakota were admitted to the Union, they came in under the provisions of an Enabling Act, 25 Stat. 676, which provided at §10 in pertinent part:[66]

> That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in

[66] 25 Stat. 676; v. 1, S.D. Comp. Laws (1978 revision) 187, 192.

> every township of said proposed States. . . are hereby granted to said States for the support of common schools. . .; provided, that the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grant . . . nor shall any lands embraced in Indian, military or other reservations of any character, be subject to the grants. . . of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain. (Emphasis added.)

As Justice Rehnquist stated: "The language of §10 is mandatory. . . ."[67] Sections 16 and 36, those sections normally granted to states to help the states finance their public schools, could not be granted from lands within any Indian reservation in the states that came into the union under the Enabling Act of February 22, 1889, unless and until the reservations were (in part, at least) disestablished.

The alternatives then are these: (1) either Congress, with no indication of an intent to do so, used its plenary powers in section 7 to create a new scheme of land grants, or (2) Congress acted to implement the grant provision in the enabling act by disestablishing part of the Cheyenne River and Standing Rock Indian Reservations.[68]

As in Rosebud, the legislative history is enlightening. When the Gamble proposal was being debated in the House, a

[67] 97 S.Ct. at 1369.

[68] This appears to be in harmony with the analysis in Rosebud, 97 S.Ct. at 1370.

question about section 7 came up. This dialogue followed:[69]

MR. FINLEY: ... In section 7 of the bill it provides that sections 16 and 36 are to be reserved for school purposes and to be paid for by the Government of the United States at the rate of $2.00 per acre. I wish to ask the gentleman this: When the State of South Dakota was made a State, was or not the State of South Dakota given school lands or lieu lands for school purposes to correspond with the amount of Indian lands held by Indians in reservations like this?

MR. SHERMAN: Oh, no. I am very sure that that was not done in either of the Dakotas, because it has not been done anywhere, as far as I know.

MR. FINLEY: The States have not been granted lieu lands where lands were held by the Indians?

MR. SHERMAN: There have been times later on when Indian reservations have been opened up that that has been done, but there are no lieu lands that could be used in the Dakotas at the present time.

MR. FINLEY: When the Territory was created into a State, a provision was made for the homesteaders?

MR. SHERMAN: A provision was made in the enabling act that the United States grant to the States sections 16 and 36 for school purposes.

MR. FINLEY: Right here, was any calculation taken of

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[69] 42 Cong. Rec. 7005 (1908).

the lands held by Indians---

MR. SHERMAN: I will ask the gentleman from South Dakota [Mr. Hall] to answer the question.

MR. HALL: I will say that the enabling act under which South Dakota, North Dakota, Washington, and Montana were admitted--it was an omnibus bill--provided for the granting in presenti of sections 16 and 36 for school purposes, and then it provided that in the case of the Indian reservations that grant of these sections for school purposes should be held in abeyance until the reservation was opened. Does that answer the gentleman's question?

MR. FINLEY: Yes.

The legislators who considered the meaning and effect of section 7 thought that they were acting pursuant to the enabling act by which South Dakota entered the union. No shred of evidence indicates that a new and separate land grant was intended. The meritorious question at this juncture, therefore, is whether or not the conclusion of disestablishment necessarily follows in this case.

The plain language of the enabling act states that lands within Indian Reservations are not subject to the school sections grant "until the reservation shall have been extinguished" and until "such lands become a part of the public domain." The reasonable and natural conclusion would therefore be that when the grants of the school sections

were actually made, from lands which were within the boundaries of Indian reservations at the time South Dakota became a State, then the reservation status of the land from which the grants were made must have been extinguished, and the land must have been made part of the public domain.

There are two possible ways of attacking this conclusion: (1) It can be argued that administrative treatment of the opened portion after the opening indicates that the land was not really public domain but rather continued to have a "reservation status;" and (2) It can be argued that only some of the opened area, not all of it, became public domain and the remainder never lost its reservation status. We will consider each of these arguments.

Dr. Hoxie researched the subject of the administration of the opened portion of the Cheyenne River Reservation after the opening.[70] He has established to this Court's satisfaction that large tracts of land in the opened area remained vacant for a long period of time; that stockmen were allowed to graze their stock on these "vacant ceded lands"[71] by obtaining permits for a fee; that the Superintendent of the Cheyenne River Reservation supervised the use of these lands; and that the Indians had a claim to the benefits derived from the lands. In sum, these lands were treated differently from lands otherwise designated as "public domain," and the Indians retained

[70]Hoxie, pp. 87-93.

[71]They were referred to as such by the First Assistant Secretary of the Interior in 1912 in a document entitled "Regulations Governing Use of Vacant Ceded Indian Lands." (Hoxie, App. 48)

a beneficial interest in them. By coupling this information with the holding of the Ash Sheep Co. case,[72] it might be argued that the effect of the 1908 Act simply could not have been to put the "so-called ceded lands" into the public domain even though the language of the enabling act appears to have required as much before the school sections were granted.

If we were writing on a totally clean slate this argument would be strong indeed. The fact of the matter is that the Supreme Court of the United States demolished precisely this argument in Rosebud.[73] As we understand the Rosebud opinion, the Supreme Court considered the question of the status of the opened portion to be "logically separate from a question of disestablishment."[74] And, the Supreme Court quoted from the opinion of the Court of Appeals for the Eighth Circuit in Rosebud, where it had been stated that "the fact that a beneficial interest is retained does not erode the scope and effect of the cession made..." [75]

[72]Ash Sheep Co. v. United States, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920) in which it was held that the Indians retain a beneficial interest in the ceded lands until sale.

[73]97 S.Ct. at 1370, n. 24.

[74]id.

[75]id. quoting from the Eighth Circuit's Rosebud opinion, 521 F.2d at 102.

In short, when the grants of school sections were made pursuant to the enabling act, the lands from which the grants were made were not thereafter in a reservation status. The precise status of the ceded-yet-vacant lands is not in issue.

The question that arises next is whether or not the dissolution of the reservation status of land which precedes or accompanies the grants of school sections necessarily applies to the total tract of land involved here. In other words, we must inquire as to whether or not there is any reasonable possibility that only school sections themselves lost their reservation status or alternatively whether or not townships which ended up without any school lands due to allotments to Indians necessarily lost their reservation status.

The plain language of the enabling act implies that the grant of sections 16 and 36 is contingent upon the extinction of the reservation status of more than the school sections themselves. Section 10 of the enabling act states in relevant part:[76]

> ... nor shall any lands embraced in Indian, military or other reservations of any character, be subject to the grants... of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

[76] §10, 25 Stat. 676.

It would require a very strained reading of the enabling act to arrive at the conclusion that the grant of sections 16 and 36 was contingent only upon extinction of the reservation status of the school sections themselves. It would require that "such lands" in the latter part of section 10 be read as referring to the numbered sections instead of "any land embraced in Indian, military or other reservations..." which appears to be the antecedent of the term "such lands." We are satisfied that Congress did not intend that the reservation status of school sections would be lost while the remaining land in a township retained a reservation status.

The question of whether or not Congress intended that some townships would lose their reservation status while others would remain in a reservation status has arisen because of the statement of the Court of Appeals for the Eighth Circuit in the Erickson case with reference to a proviso in section 9. The proviso referred to states:[77]

> That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, ... for domestic purposes only as long as the lands remain part of the public domain.

The Eighth Circuit thought that "Congress may have intended

[77] §9, 35 Stat. 460.

to restore only this Northern strip of townships to the public domain..."[78] The question now is whether or not this is a reasonable possibility in view of the breadth of inquiry that is possible under Rosebud.

In this Court's judgment it is not. The proviso was added to S. 1385 on April 15, 1908, as an amendment proposed by Senator Gamble.[79] The legislative history is devoid of any evidence that indicates that the status of this northern strip of townships was to be any different than the status of any other townships.

More importantly, certain ceded lands which had not been disposed of under the authority of 35 Stat. 460 and the presidential proclamation pursuant thereto were restored to tribal ownership and "added to and made a part of the existing reservation" by an Order of Restoration of June 12, 1941 and an Order of Restoration of January 21, 1952.[80] The wording of these orders makes no sense if the existing reservation at the time encompassed these lands as it would not have been necessary to make something a part of the reservation if it already was a part; moreover, an examination of the orders will readily indicate that no distinction whatsoever was made between the northern strip of townships

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[78] 478 F.2d at 687.

[79] 42 Cong. Rec. 4755 (1908).

[80] Defendant's Ex. A, Doc. 18 & 19.

and any other townships in the opened area. There is no basis at all in any documents presented to this Court for the proposition that certain townships in the opened area were made part of the public domain by the terms of the 1908 Act and that others were not. As we said earlier, the precise status of land in the opened portion is not in issue and need not be established. What can be unequivocally stated is that the status of the land in the opened portion was uniform throughout upon the opening of the area to entry and settlement. Of course, the status of the various pieces of land did not remain uniform; some sections went to the State and eventually much of the land was transferred in fee to homesteaders.

We further note that the proviso of section 9 and its "public domain" terminology tends to buttress this Court's conclusion that the school sections grant was contingent upon the reservation status of the entire tract being extinguished. In this respect there is no reason to distinguish between school sections and the other sections in a township. If Congress had intended to grant the school sections upon the extinction of the reservation status of only those sections, there would have been no reason for all of the remaining sections in the northern strip of townships to have been made public domain. But clearly, the townships (except for the allotments) were made public domain by the 1908 Act.

Earlier we stated that one could not accept certain committee reports as sources from which congressional intent can be derived and at the same time hold the belief that Congress had not clearly manifested an intent to alter the boundaries of the Cheyenne River Indian Reservation. After examining section 7 of the 1908 Act in detail in conjunction with the enabling act, we believe that one cannc accept the Supreme Court's Opinion in Rosebud as authoritative for this situation and still come out with the opinion that Congress could have intended anything other than disestablishment. Once it is accepted that Congress made the school sections grant pursuant to the enabling act, there is no logical way to construct a theory that leaves the area from which the school sections are granted in a reservation status, because the presupposition of the grant pursuant to the enabling act is the extinction of reservation status.

The counsel for the United States is commendably candid at this point and has stated:[81]

> The so-called "school lands" provision presents the United States with a particular dilemma. We think that as a legal matter the Supreme Court incorrectly decided that the inclusion of this provision means that the lands opened to settlement are no longer part of an Indian reservation.

Government counsel then proceeds to try to distinguish section 7 and its effect in this case from the analogous

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[81] M.U.S. at 22.

provisions in the acts construed in Rosebud. The attempt is necessary for the government's position, but unsuccessful. There is no meaningful distinction that can be made between section 7 of this Act and the comparable sections construed in Rosebud and Cook.[82] Compare section 7 to: §4, 33 Stat. 258 (1904) pertaining to Gregory County; §6, 34 Stat. 1230 (1907) pertaining to Tripp and Lyman Counties; and §8, 36 Stat. 448 (1910) pertaining to Mellette County; and §8, 36 Stat. 440 (1910) pertaining to Bennett County.

It is this Court's conclusion that section 7 of the 1908 Act read in conjunction with section 9 and in conjunction with the enabling act is fully consistent with a conclusion of disestablishment and inconsistent with any other conclusion.

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[82] United States ex rel. Cook v. Parkinson, 396 F.Supp. 473 (1975), affirmed 525 F.2d 120 (1975).

VI. POST-1908 TREATMENT OF THE AREA IN DISPUTE

A. Legislative Treatment.

On August 19, 1909, President William H. Taft proclaimed certain portions of the Cheyenne River and Standing Rock Indian Reservations open for entry and settlement on a date certain and under specified terms. 35 Stat. 2500 (1909). This proclamation was not, as was the proclamation of May 13, 1904, pertaining to Gregory County, "an unambiguous, contemporaneous, statement by the Nation's Chief Executive, of a perceived disestablishment ...." 97 S.Ct. at 1371. It was, however, similar to the Presidential Proclamation of June 29, 1911 (37 Stat. 1691) pertaining to Mellette County. Comparisons of proclamations cannot be determinative one way or the other in this case.

Legislation passed subsequent to the passage of the Gamble bill and legislative proposals of the post-1908 era are more enlightening. As is well known to all who have studied the cases dealing with the Rosebud and Pine Ridge reservations, the pressure for opening reservation land in South Dakota for settlement continued after 1908. An effort was made to open that portion of the Cheyenne River Indian Reservation that had not been opened by the legislation of 1908. Although no proposal to open the remainder of the Cheyenne River Reservation was ever enacted into law, one particular proposal reflects the contemporary understanding of the 1908 Act.

In 1909 Senator Gamble introduced S. 3285, the purpose of which was to authorize the sale and disposition of the remaining surplus and unallotted land on the Cheyenne River Reservation.[83] The bill went to the Senate Committee on Indian Affairs. On April 7, 1910, the Committee submitted its report[84] and attached to that report some official correspondence. One attachment, expressly made a part of the report itself, was a letter from Secretary of the Interior, R. A. Ballinger to Moses E. Clapp, Chairman of the Senate Committee on Indian Affairs, which letter stated in part:[85]

> The lands described in section 1 of the bill comprise all of the Cheyenne River Reservation... (Emphasis added.)

In the report itself, the following statement was made:[86]

> The area proposed to be opened is 1,209,600 acres.

The acreage which was stated to be the amount that would be opened by S. 3285 and was said to include all of the reservation did not include the unallotted land in the area opened by the 1908 Act. The Senate Committee on Indian Affairs must have considered "the reservation" to be that geographical area which had not been included in section 1 of the 1908 Act.

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[83] 45 Cong. Rec. 39 (1909).

[84] S.Rep. No. 518, 61st Cong. 2nd Sess. (1910).

[85] id. at 4.

[86] id. at 2.

The 1908 Act had been passed in the midst of a squabble over the price to be paid for school sections. The legislators who wanted to pay more than $1.25 per acre for the school sections for the benefit of the Indian people kept pressing the point, and in late 1908, S. 7914 was introduced for the purpose of amending sections 7 and 8 of 35 Stat. 460, in order to give a higher price for school land. From the materials submitted to us, it appears that action on the bill was repeatedly delayed and it never came up for a vote.

Eventually Senator Gamble introduced another bill (S.3286) to carry out the same purpose. The bill came before the Senate on January 11, 1910, and at the time Senator Gamble referred to the enabling act by which South Dakota had come into the union as the basis for those particular provisions in the 1908 Act which granted school sections.[87] Senator Nelson from Minnesota requested that the bill be passed over until he had a chance to examine the enabling act.[88]

On January 18, 1910, S. 3286 again came before the Senate, and a debate took place.[89] As usual, the problem was money. In this particular debate, however, Senator Gamble explained his understanding of the relationship between the enabling act, §10, and section 7 of the 1908 Act in question. He stated:[90]

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[87] 45 Cong. Rec. 504 (1910).

[88] id.

[89] 45 Cong. Rec. 739 (1910).

[90] id.

> Mr. President, I call attention to section 10 of the enabling act providing for the admission into the union of North Dakota, South Dakota...
>
> By the very act[91] itself, Mr. President, the lands become a part of the public domain, and the original grant to the States at that time becomes operative.

This appears to be an unequivocal statement by the sponsor of the 1908 legislation about the meaning thereof. The only question was how much compensation the Indians should get.

The debate continued:[92]

MR. LODGE: Mr. President, I do not wish to delay the bill going over. I merely wish to say, as I asked for the reading of the section of the statute, that it does not in the slightest degree bind the United States to buy the lands and extinguish the title of the Indians on these reservations.

MR. GAMBLE: Mr. President, on a proper interpretation of the section it certainly does bind the government.

MR. LODGE: I am only interpreting the act as I heard it read.

MR. GAMBLE: It donates affirmatively sections 16 and 36,

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[91] Referring to the 1908 Act.

[92] 45 Cong. Rec. 739 (1910).

and pledges the faith of the Government that when the Indian title becomes extinguished the grant will become operative. It has been the uniform practice of the government throughout its history in the public-land States to grant these lands, but in later years, as the land has appreciated in value, of course the price and amount we pay has been increased.

The government has urged that this particular debate between Senators Lodge and Gamble raises the possibility that the latter's view of the effect of the 1908 legislation which he sponsored may have in fact been erroneous because it was "strongly challenged" by Senator Lodge.[93] It appears to this Court that the disagreement was not over the effect of the legislation once it was passed (whether Indian title was extinguished, etc.), but instead centered on the question of whether or not the United States was obligated by virtue of the enabling act to buy certain lands when Indian title theret o had been extinguished. We see nothing in this debate that challenges our prior statement that grants of school sections presuppose the termination of reservation status.

While this type of maneuvering was going on in the Senate, the House considered and passed H.R. 12438 which in substance did the same thing as S. 3286; hence, when the House bill came to the Senate, the Senate version was dropped.[94] The

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[93] M.U.S. at 23 n. 16.

[94] 45 Cong. Rec. 1647 (1910).

relevant point in the passage of H.R. 12438 through Congress is again a matter that took place on the Senate floor.[95] Senator Gamble offered an amendment which had been recommended by the Secretary of Interior. It read as follows:

> That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the said States or otherwise disposed of under the provisions of this Act shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into Indian country. (Emphasis added.)

The amendment was agreed to, the House bill was passed by the Senate[96] and then went back to the House with the liquor prohibition amendment. It was debated in the House.[97] Questions were put to Congressman Burke as to the reasons for the amendment. After explaining that South Dakota did not have a state constitutional prohibition against the sale of intoxicating liquor, he stated:[98]

> In the tract affected by this legislation the Indians have taken allotments, and one-third, perhaps, if not more, of the tract has been allotted to the Indians. The allotments run for twenty-five years, and it is the theory of the committees having jurisdiction of Indian legislation that during the trust period, at least, and while

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[95] id.

[96] id.

[97] 45 Cong. Rec. 1769 (1910).

[98] id.

> these Indians will be in that country holding allotments, the laws relative to the introduction of liquor into the Indian country shall be extended into that country. That is the purpose of this legislation. (Emphasis added.)

This legislation in 1910 would have made no sense if the geographical area authorized to be opened by the 1908 Act had been considered, as a legal matter, to be part of the Cheyenne River Reservation inasmuch as it would then have been "Indian country." Selling intoxicants in "Indian country" was already prohibited. 27 Stat. 260 (1892). Additionally, the reason raised in the debate for a possible objection to the amendment was that "the internal policy of the local government should not be determined by Congress on the liquor question but should be reserved for the State...."[99]

These Congressmen had to have been acting on the assumption that the opened portion of "the reservation" was no longer legally in a reservation status. The same conclusion was reached by the Court of Appeals for the Eighth Circuit in examining an analogous provision in the Rosebud case[100] as well as by the Supreme Court in examining the same provision in Rosebud.[101] The Supreme Court of South Dakota has already reached the same conclusion as this Court in construing this

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[99] 45 Cong. Rec. 1769 (1910) statement of Congressman Stafford of Wisconsin.

[100] 521 F.2d at 112, 113.

[101] 97 S.Ct. at 1376.

1910 liquor prohibition provision in relation to the 1908 Act itself.[102]

It seems clear that congressional action after passage of the 1908 Act harmonizes with the congressionally manifested intent surrounding the passage of the Act. Moreover, the post-1908 statements and actions heretofore referred to are inconsistent with an intent to preserve the 1889 Cheyenne River Reservation boundaries.

Government counsel admits that the liquor provision is problematic,[103] and does not dwell upon post-1908 legislative treatment of the area. The tribe, however, has devoted a portion of its memorandum to the subject.[104]104 Many quotations from the legislative histories of various bills are reproduced and together they only tend to establish the proposition that Congress, subsequent to 1908, referred occasionally to lands within the opened portion as being "within the Cheyenne River Indian Reservation."

On balance, legislation and the legislative histories of bills in the post-1908 decades provide firm support for the conclusion that this Court reached by studying the 1908 Act in the light of legislative history.

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[102] 256 N.W. 2d at 126.

[103] M.U.S. at 24.

[104] Tribe's memorandum (hereinafter T.M.) pp. 7-11.

The tribe states in its brief that Congress and the Interior Department officials talked about "the reservation" in many instances as if it still reached to its 1889 boundaries. So did the State's Attorney for Dewey County who was called by defendant at the hearing on January 9, 1978.[105] Defense counsel asked:

> What did your research show, then, in that regard, with regard to the cases involving Indians which were handled by the county in the opened portion?

The witness answered:

> That since 1910 until the Condon case in 1972, the county exercised jurisdiction over both whites and Indians. This was limited strictly to the cases involving Indians in the open portion of the reservation. (Emphasis added.)

It appears that the term "the reservation," especially with the qualifier "opened portion," has been used by many persons, including those who are convinced that the opened portion is not legally reservation, to designate the geographical area that was affected by the 1908 Act.

This is rather far removed, however, from congressional intent in 1908. It is evidence that could be construed as a commonly shared perception of an undiminished reservation. But it is very slight in comparison with the probative value of the records heretofore discussed. We give no weight whatever to the correspondence cited by the tribe in conjunction with the passage of a 1975 Act as that was after Erickson.

[105] See transcript of hearing held in Pierre, South Dakota on January 9, 1978, at 16, 17.

B. Judicial and Administrative Treatment

The first landmark in the jurisdictional history of the disputed area is LaPlant, supra, which was decided one year after the area was opened for settlement. Orville LaPlant was charged with the slaying of George Martin. He was alleged to have killed Martin on land that had been opened to settlement by the Act of May 29, 1908; specifically, on land designated as the townsite of Dupree. LaPlant claimed the federal court had no jurisdiction. The U. S. District Judge agreed.

At the hearing on January 9, 1978, the present state's attorney for Dewey County testified on the basis of his personal knowledge and on the basis of his research in the county records, and stated that it was his belief that the state had exercised jurisdiction over the geographical area opened to settlement (except for Indian allotments) for over sixty years or until Erickson, supra, in 1972.[106] South Dakota case law is in accordance with that view. e.g. State v. Sauter, 205 N.W. 25 (1925).

Counsel for the United States and counsel for the tribe have alleged that the jurisdictional history of the area is other than what the state's attorney indicated, and Dr. Hoxie has prepared a substantial amount of material that is purportedly of importance for the study of jurisdictional

[106] id.

history. We have examined this material and will hereinafter state the conclusions we have reached.

The most direct challenge to defendant's and the counties' arguments is based upon that portion of Dr. Hoxie's analysis wherein he deals with law enforcement on the Cheyenne River Reservation after 1910.[107] Dr. Hoxie studied the function of the tribal courts, the state courts, and the federal court, as well as the work of the tribal police in the years following 1910, and then compared the roles played by these different governmental entities.

Dr. Hoxie has pointed out that the Cheyenne River Reservation had a reasonably well-developed tribal judiciary and tribal police force at the time of the opening; that this system was supervised by federal officials and generally met with their strong approval; that the Indians respected this tribal system and depended upon it; that the system remained intact after the opening in 1910; and that Indian persons living in the "opened portion" were not necessarily beyond the jurisdiction of tribal officials. He has further established that in the years following 1910 the U. S. Attorney for the District of South Dakota gave considerable attention to criminal matters arising on the Cheyenne River Reservation; that the U. S. Attorney successfully represented the Indian people when the officials of Dewey County tried to tax

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[107] Hoxie, pp. 100-128

certain personal property belonging to the Indians; and that these criminal and civil matters were handled in federal court. Finally, Dr. Hoxie has pointed out that county officials took virtually no control over liquor traffic and gambling in the years following 1910; that county officials seldom attempted to prosecute Indian persons for crimes unless a white person was involved; and that civil matters involving exclusively Indian persons were taken to tribal court instead of a state court except for divorce cases. From this the Court is apparently asked to leap to the conclusion that the reservation was not diminished.

In spite of all of the labor that apparently was put into the analysis in this area, this part of the analysis has been of little value for several reasons. First, assertions are repeatedly made with respect to the criminal jurisdiction of the tribal and federal official, as opposed to the criminal jurisdiction of county officials, in the "opened portion" without making the crucial distinction between acts alleged to have occurred on Indian allotments as opposed to fee land held by the settlers. Second, the LaPlant case is not recognize. Third, the conclusions that are drawn often relate more to the motives and attitudes of local settlers than to the legal question at issue. Finally, upon study and reflection, the conclusions in the analysis simply do not follow from the sources upon which they are allegedly based.

Much of the information which was gathered for the analysis might arguably support some moral judgments, but it does not support the theory that the reservation remained undiminished after the 1908 Act.

We are not stating that all of the information is irrelevant. We are satisfied that towns which sprang up in the opened portion after the opening in 1910 had more than a fair share of scoundrels, and that the tribal government and federal government tried to protect the Indians under their jurisdiction from being brutalized by these people. It further appears that the county governments were short of funds and were inclined to ignore crimes involving only Indians, and that this vacuum was filled to some degree by federal and tribal authorities who may have at times assumed jurisdiction over matters, both civil and criminal, involving Indians without strict reference to the boundary between Indian country and land not in Indian country. This may have been proper for federal officials in some cases by virtue of their authority to supervise vacant ceded lands. In other cases general laws of the United States may have been the justification for federal intervention. In some cases there may have been no legal justification for assertions of tribal or federal authority. We cannot, however, on the basis of the evidence presented leap to the conclusion

that federal, tribal or state officials in the years following the opening perceived the Cheyenne River Reservation as being undiminished.

A less direct challenge to the defendant's and the counties' assertions relative to the jurisdictional history of the area is made in reliance upon information about the government schools, the tribal council and the work of officials known as "district farmers" in the years following the opening.[108] The argument made in that part of the analysis is a particularized version of the argument discussed in Part II of this opinion. We will discuss briefly the information presented about the district farmers or "boss farmers."

At the time of the opening the boss farmer was a federal official of considerable importance on the Cheyenne River Reservation. As a key figure in the government's program to "civilize," he supervised the farming and cattle operations on a vast amount of land. Because he had access to both the Indian and non-Indian communities, he became an arbiter of disputes as well as administrator and technician.
Dr. Hoxie has established with the supporting documents that the duties of the district farmers were not reduced by virtue of the opening for settlement. He has further demonstrated that the district farmers carried on with their duties

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[108] Hoxie, pp. 64-93. We omit here any reference to the administration of the opened area as that was discussed in Part V.

outside of the diminished reservation after 1910. From this he concludes that the 1908 Act must not have diminished the Cheyenne River Indian Reservation.

Using Dr. Hoxie's own analysis, it appears that many Indian people took their allotments in the geographical area opened to non-Indian settlers in 1910.[109] In 1909 when the proclamation to open land for settlement was issued, 1,197 out of 2,179 allotments, or 55%, had been made outside of the diminished reservation.[110] The district farmers, it appears, continued to provide leadership and services for the Indians on their allotments off of the diminished reservation. The federal government was under no obligation to confine its services to persons residing within the geographical boundaries of the reservation. Thus, the conclusion in the analysis is wrong because the initial assumption is wrong.

It was apparently assumed that federal officials assisting Indians in 1910 were necessarily working on reservations. Data was accumulated relative to the working areas of certain federal officials. As it turned out, they were found to have been working near the 55% who took allotments in the geographical area that was opened. It was then concluded that this must have been "on the reservation" as a

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[109] Hoxie, p. 38.

[110] id. Also appendix 2 containing information from the allotment schedule in the Cheyenne River Agency realty office.

legal matter. This Court does not criticize the accuracy of the data assembled or the chain of reasoning but does believe that the initial assumption was erroneous. The argument based upon the functions of government schools and the necessity for them, and the argument based upon the work of the tribal council suffer from the same deficiency.

VII. CONCLUSION

Because it would also be applicable to this case, this Court again states the following from Rosebud:

> There can be little doubt but that the members of Congress coveted Indian lands. This Court must determine the intent of Congress as it existed at the turn of the century. Time and again the Indians were given reservations, only to have the settlers' need for land mandate a redefining of the reservation boundaries. While this Court does not necessarily agree with the mores or the methods employed at that time, there is little doubt that the congressmen were engaged in the process with the 'doing away' of the reservations. This Court's only function is to determine congressional intent, not to rewrite history.
>
> This Court is aware of the many decisions that various courts have rendered regarding the jurisdictional boundaries of various Indian reservations. However, each congressional act and treaty is different and must be so examined. As the Eighth Circuit Court of Appeals said in Kills Plenty, et al v. United States, 133 F.2d 292, 295 (8th Cir. 1943):
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> 'It can, of course, be argued that the words 'within the limits of any Indian reservation' should mean the same thing in any statute, but the argument, we think, is unsound. . . . To find that meaning the words must be viewed in their setting, and the history and purpose of the Act must be considered.'

When the Court of Appeals for the Eighth Circuit decided the Erickson case in 1973, the breadth of inquiry allowed by DeCoteau and Rosebud was not recognized as the applicable guide to statutory construction in a case of this type. Traditional and more limited methods of statutory construction were at that time relied upon. Operating

within such a limited framework, the wealth of materials available here could not be considered. Erickson is therefore not viable.

The Supreme Court of the United States, having had the benefit of many materials on surrounding circumstances and legislative history in the DeCoteau case, stated:

> For the courts to reinstate the entire Reservation ... would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes.
>
> A canon of construction is not a license to disregard clear expressions of tribal and congressional intent. 420 U.S. at 447.

We have taken that admonition seriously. In this case, one can read the records and readily conclude that the congressional intent of the action of 1908 was contrary to the desires of many of the Cheyenne River Reservation people, but it is plain that Congress acted anyway with the intent to disestablish a portion of their reservation.

Based upon the foregoing, the defendant's motion to dismiss will be granted.

BY THE COURT:

ANDREW W. BOGUE
UNITED STATES DISTRICT JUDGE

APPENDIX C

ACT OF MAY 29, 1908 (CHEYENNE RIVER ACT)

ACT OF FEBRUARY 17, 1910

Persons cutting timber allowed.

Pasturage

Sale of timber.

Use of proceeds.

specially designated: *Provided*, That until further legislation the Indians and the officials and employees in the Indian Service on said reservation shall, without cost to them, have the right, under such regulations as the Secretary of the Interior may prescribe, to go upon said timber lands and cut and take therefrom all timber necessary for fuel, or for lumber for the erection of buildings, fences, or other domestic purposes upon their allotments; and for said period the said Indians shall have the privilege of pasturing their cattle, horses, and sheep on said timber lands, subject to such rules and regulations as the Secretary of the Interior may prescribe: *Provided further*, That the Secretary of the Interior is hereby authorized to sell and dispose of for the benefit of the Indians such timber upon said timber lands as in his judgment has reached maturity and is deteriorating and which, in his judgment, would be for the best interests of the Indians to sell, the purpose being to as far as possible protect, conserve, and promote the growth of timber upon said timber lands. The Secretary of the Interior shall deduct from the money received from the sale of such timber the actual expense of making such sale and place the balance to the credit of said Indians, and he is authorized to prescribe such rules and regulations for the sale and removal of such timber so sold as he may deem advisable.

Appropriation to pay for lands granted to Washington.

Further appropriation.

Proviso. Reimbursement.

SEC. 6. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations for the purpose of carrying out the provisions of this Act, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of five thousand dollars, or so much thereof as may be necessary, to pay the Indians for the lands granted to the State of Washington, as provided in section three of this Act, and there is hereby appropriated the further sum of seven thousand dollars, or so much thereof as may be necessary, for the purpose of carrying out the other provisions of this Act: *Provided*, That the appropriation other than that to pay for the lands granted to the State of Washington shall be reimbursed to the United States from the proceeds of the sale of the lands described herein, or from any money in the Treasury of the United States belonging to the said Spokane Indians.

Non-responsibility of United States.

Proviso. Treaty rights not affected.

SEC. 7. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six of the agricultural lands or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received as herein provided: *Provided*, That nothing in this Act shall be construed to deprive said Indians of the Spokane Indian Reservation, in the State of Washington, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, May 29, 1908.

May 29, 1908.
[Public, No. 156.]

CHAP. 218.—An Act To authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect.

Sioux Indians. Sale of lands in Cheyenne River and Standing Rock reservations, S. Dak. and N. Dak.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota

and North Dakota lying and being within the following described boundaries, to-wit: Beginning at a point on the one hundred and second meridian of longitude west, where the township line between townships nine and ten north intersects the same; thence east on said township line to a point where the same intersects the range line between ranges twenty-four and twenty-five east of the Black Hills meridian; thence north on said range line to a point where the same intersects the township line between townships fifteen and sixteen north; thence east along said township line to a point in the center of the main channel of the Missouri River; thence in a northerly direction along the center of the main channel of said Missouri River to a point where the township line between townships eighteen and nineteen north intersects the same, and including also entirely all islands, if any, in said river; thence west on said township line to a point where the range line between ranges twenty-two and twenty-three east intersects the same; thence north along said range line to the northwest corner of section nineteen in township twenty-one north of range twenty-three east; thence east on the section line north of sections nineteen, twenty, twenty-one, twenty-two, twenty-three and twenty-four to a point where the same intersects the range line between ranges twenty-three and twenty-four east; thence north along said range line to the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges eighty-four and eighty-five west in North Dakota intersects the same; thence north on said range line to a point where said range line intersects the center of the main channel of the South Fork of the Cannon Ball River; thence in a westerly direction up and along the center of the main channel of the said river to a point where the same intersects the one hundred and second meridian of longitude west; thence south along said one hundred and second meridian of longitude west to the place of beginning, except such portions thereof as have been allotted to Indians: *Provided*, That sections sixteen and thirty-six of the lands in each township therein shall not be disposed of, but shall be reserved for the use of the common schools of the States of South Dakota and North Dakota, as the same may be located in the said States, respectively: *Provided further*, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: *Provided, however*, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization heretofore engaged in mission or school work on said reservations, for such lands thereon (not included in any town site herein provided for) as have been heretofore set apart to such organization for mission or school purposes.

Description.

Proviso. School lands reserved.

Lands reserved for agency, etc., purposes.

Patents in fee to religious organizations.

Opened to settlement by proclamation.

SEC. 2. That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided*, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the area described in section one of this Act to relinquish such allotment and to receive in lieu thereof an allotment anywhere within the respective reservations thus diminished to which reservation the said Indians may belong: *Provided further*, That prior to the said proclamation the Secretary of the Interior shall cause allotments to be made to every man, woman, and

Proviso. Lands to Indians in lieu of allotted lands.

Allotments to be made.

child belonging to or holding tribal relations in said Cheyenne River and Standing Rock reservations who have not heretofore received the allotments to which they are entitled under provisions of existing laws: *Provided further*, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within said reservations, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal, the said Secretary is hereby authorized to reserve them from allotment or disposition until further action by Congress: *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Survey.

Coal lands reserved.

Rights of soldiers and sailors not affected.
R. S., sec. 2304, 2305, p. 422.
Vol. 31, p. 847.

Price fixed by appraisement.

SEC. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement as herein provided. The President of the United States shall appoint two commissions, one for each reservation, each commission to consist of three persons to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six in each of said townships, each commission to be constituted as follows: One resident citizen of the States of North or South Dakota, one representative of the Indian Bureau and one person holding tribal relations with one of said tribes of Indians. That within twenty days after their appointment the said commissioners so appointed for each of the said reservations, respectively, shall meet and organize by the election of one of their number as chairman. Each commission is hereby empowered to select such clerks and assistants at such compensation as the Secretary of the Interior may approve. That said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining lands embraced within each reservation as described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands and necessary expenses to be approved by the Secretary of the Interior; such inspection and classification to be completed within six months from the date of the organization of said commissions respectively, and no compensation shall be paid to either the commissioners or employees after the said six months. That when said commissions shall have completed the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

Two commissions created.

Duties.

Composition.

Organization.

Clerks.

Classification, appraisement, etc.

Division of lands.

Conclusion.

Time limit for classification, etc.

Approval.

Payment of purchase price.

SEC. 4. That the price of said lands shall be paid in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry under the provisions of the homestead law at the appraised price thereof: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting

Proviso.
Commutation.
R. S., sec. 2301, p. 421.

their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered. *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act. And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for cash without regard to the prescribed price thereof fixed under the provisions of this Act, under such rules and regulations as the Secretary of the Interior may prescribe.

Fees and commissions.

Patents.

Reappraisal of undisposed lands.

Sale of remaining lands.

SEC. 5. That the Secretary of the Interior is authorized to reserve from said lands such tracts for townsite purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

Townsites reserved.

Survey.

R. S., sec. 2381, p. 436.

SEC. 6. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the reservations aforesaid in the States of South Dakota and North Dakota the sums to which the respective tribes may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians respectively shall be expended for their benefit under the direction of the Secretary of the Interior.

Deposit of proceeds to credit of Indians.

Use of proceeds.

SEC. 7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Purchase of school lands for South Dakota and North Dakota.

Price per acre.

Lieu lands.

SEC. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than two hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification and allotments

Appropriation to pay for lands granted to South Dakota and North Dakota.

Appropriation for expense of allotment, etc.

Proviso.
Reimbursement.

provided for herein: *Provided*, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes respectively.

Non-responsibility of United States.

SEC. 9. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this Act shall be construed to deprive the said Indians of the Cheyenne River or Standing Rock Indian reservations, in South Dakota and North Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act: *Provided*, That Indians residing upon their allotments in townships sixteen north of ranges twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, and thirty-one east shall have the right to use timber in said townships, except on sections sixteen and thirty-six for domestic purposes only as long as the lands remain part of the public domain.

Proviso.
Treaty rights not affected.

Use of timber permitted.

Approved, May 29, 1908.

May 29, 1908.
[S. 2294.]
[Public, No. 120.]

CHAP. 219. An Act To extend the time within which the Washington and Western Maryland Railroad Company shall be required to complete the road of said company under the provisions of an Act of Congress approved March second, eighteen hundred and eighty-nine, as amended by an Act of Congress approved June twenty-eighth, nineteen hundred and six.

District of Columbia. Washington and Western Maryland Railroad Company.
Vol. 25, p. 976.
Time of construction extended.
Vol. 34, p. 486, amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time within which the Washington and Western Maryland Railroad Company is required to complete and put in operation its railroad in the District of Columbia under the provisions of an Act of Congress approved March second, eighteen hundred and eighty-nine, as amended by an Act of Congress approved June twenty-eighth, nineteen hundred and six, be, and the same is hereby, extended for the term of eighteen months from the twenty-eighth day of December, nineteen hundred and seven, and all of the franchises, rights, and powers conferred by said Acts, or either of them, upon said railroad company, may be enjoyed and exercised as fully and completely as if said railroad had been completed and put in operation prior to the twenty-eighth day of December, anno Domini nineteen hundred and seven: *Provided*, That within one month after the approval of this Act the said Washington and Western Maryland Railroad Company shall deposit with the collector of taxes of the District of Columbia the sum of two thousand dollars to guarantee the construction of said railroad within the time herein extended. If this sum is not so deposited this Act shall be void; if this sum is deposited and the said railroad company shall fail to construct and have in operation the said railroad, within the time herein prescribed, the said sum shall be forfeited to the District of Columbia and this Act shall be void.

Proviso.
Deposit.

Forfeiture.

Approved, May 29, 1908.

Pennsylvania, to a point on the opposite side of said river in the borough of Glassport, said county and State, in accordance with the provisions of the Act entitled "An Act to regulate construction of bridges over navigable waters," approved March twenty-third, nineteen hundred and six.

Vol. 34, p. 84.

Amendment.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, February 16, 1910.

February 16, 1910.
[H. R. 13822.]
[Public, No. 38.]

CHAP. 39.—An Act To extend the time for the completion of a bridge across the Mississippi River at Saint Louis, Missouri, for the Saint Louis Electric Bridge Company.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the time for completing the construction of the bridge authorized by the Act entitled "An Act providing for the construction of a bridge across the Mississippi River," approved February fifteenth, nineteen hundred and seven, is hereby extended to one year from the date of the passage of this Act.

Mississippi River. Time extended for bridging, by Saint Louis Electric Bridge Company.
Vol. 34, p. 892.

Amendment.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, February 16, 1910.

February 17, 1910.
[H. R. 12458.]
[Public, No. 46.]

CHAP. 40.—An Act To amend sections seven and eight of the Act of May twenty-ninth, nineteen hundred and eight, entitled "An Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections seven and eight of the Act of May twenty-ninth, nineteen hundred and eight, entitled "An Act to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect," are amended and as so amended are re-enacted to read as follows:

Cheyenne River and Standing Rock Indian reservations, S. Dak. and N. Dak.
Sale of lands on.
Vol. 35, p. 460, amended.

"SEC. 7. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota for such purpose as the same are located in the said States, respectively; and in case any of said sections, or parts thereof, are lost to said States by reason of allotments thereof to any Indian or Indians, or otherwise, the governors of said States, respectively, with the approval of the Secretary of the Interior, are hereby authorized, within the area in the respective States described in section one of this Act, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Purchase of school lands for South Dakota and North Dakota.
Price increased.

Location of lieu lands.

Appropriation to pay for lands granted to South and North Dakotas, increased.

"SEC. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than four hundred and fifteen thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of seventy-five thousand dollars, or so much thereof as may be necessary, for the

Appropriation for expenses of allotting, etc.

purpose of making the appraisement and classification and allotments provided for herein: *Provided*, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes, respectively: *And provided further*, That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the said States, or otherwise disposed of under the provisions of this Act, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country."

Approved, February 17, 1910.

Proviso. Reimbursement.

Intoxicants prohibited for 25 years.

CHAP. 41.—An Act To authorize certain changes in the permanent system of highways plan, District of Columbia.

February 19, 1910. [H. R. 15410.] [Public, No. 47.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioners of the District of Columbia are hereby authorized to prepare a new highway plan for that portion of the third section of the permanent system of highways plan lying west of Rock Creek, north of Massachusetts avenue and the Observatory Circle, east of Thirty-sixth street west, south of Cathedral avenue, southwest of Cleveland avenue, south of Calvert street, and southwest of Connecticut avenue, under the provision contained in the Act of Congress approved March second, eighteen hundred and ninety-three, entitled "An Act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," and the amendment to said Act approved June twenty-eighth, eighteen hundred and ninety-eight, which reads as follows:

District of Columbia. New highway plan for northwest section.

Vol. 27, p. 532.

Vol. 30, p. 520.

"The plat of such readjustment, after being duly certified by said commissioners, shall be forwarded to the commission, consisting of the Secretary of War, the Secretary of the Interior, and the Chief of Engineers of the United States Army, and when approved by said commission or a majority thereof the change shall be recorded in the office of the surveyor of the District of Columbia, and become a part of the permanent system of highways, and take the place of any part inconsistent therewith."

Record, etc., of changes.

Approved, February 19, 1910.

CHAP. 42.—An Act To authorize the Thacker Coal Mining Company to construct a footbridge across Tug River, at Thacker, Mingo County, West Virginia.

February 19, 1910. [H. R. 19011.] [Public, No. 48.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Thacker Coal Mining Company, a corporation organized under the laws of the State of West Virginia, is hereby authorized to construct, maintain, and operate a footbridge and approaches thereto, across the Tug River at a point suitable to the interests of navigation, at or near Thacker, in the county of Mingo, in the State of West Virginia, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March twenty-third, nineteen hundred and six.

Tug River, W. Va. Thacker Coal Mining Company may bridge at Thacker.

Vol. 34, p. 84.

SEC. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Amendment.

Approved, February 19 1910.

App. C, p.7

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APPENDIX D

ACT OF MARCH 2, 1907

ACT OF MAY 27, 1910

(ROSEBUD ACTS)

Act of Mar. 2, 1907 ch. 2536, 34 Stat. 1230

CHAP. 2536.—An Act To authorize the sale and disposition of a portion of the surplus or unallotted lands in the Rosebud Indian Reservation, in the State of South Dakota, and making appropriation and provision to carry the same into effect.

Be in enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River and east of range twenty-five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians: *Provided*, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.

Sec. 2. That the land shall be disposed of by proclamation, under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted

to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided*, That prior to the said proclamation the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotment and to receive in lieu thereof an allotment anywhere within said reservation, and he shall also allot one hundred and sixty acres of land to each child of Indian parentage whose father or mother is or was, in case of death, a duly enrolled member of the Sioux tribe of Indians belonging on the Rosebud Reservation who is living at the time of the passage and approval of this Act and who has not heretofore received an allotment: *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That the price of said lands entered as homesteads under the provisions of this Act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars per acre, and upon all land entered or filed upon after the expiration of three months and within six months after the same shall have opened for settlement and entry, four dollars and fifty cents per acre; after the expiration of six months after the same shall have been opened for settlement and entry the price shall be two dollars and fifty cents per acre. The price shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry,

and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry under the provisions of the homestead law at the same price that it was first entered: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of the land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of the said lands to entry shall be sold to the highest bidder for cash at not less than two dollars and fifty cents per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price.

Sec. 4. That the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site

purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into blocks and lots and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the United States Revised Statutes. The net proceeds derived from the sale of such lands shall be credited to the Indians as hereinafter provided.

Sec. 5. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the Rosebud Reservation, in the State of South Dakota, the sum of one million dollars, which shall draw interest at three per centum per annum for ten years, the interest to be paid to the Indians per capita in cash annually, share and share alike; that at the expiration of ten years, after one million dollars shall have been deposited as aforesaid, the said sum shall be distributed and paid to said Indians per capita in cash; that the balance of the proceeds arising from the sale and disposition of the lands as aforesaid shall be deposited in the Treasury of the United States to the credit of said Indians and shall be expended for their benefit under the direction of the Secretary of the Interior, and he may, in his discretion, upon an application by a majority of said Indians, pay a portion of the same to the Indians in cash, per capita, share and share alike, if in his opinion such payments will be for the best interests of said Indians.

Sec. 6. That sections sixteen and thirty-six of the lands in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools

and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, are lost to said State of South Dakota by reason of allottments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the tract described herein, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

Sec. 7. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and sixty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section six of this Act. And there is hereby appropriated the further sum of fifteen thousand dollars, or so much thereof as may be necessary, for the purpose of making the allotments provided for herein: *Provided*, That the same shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Rosebud Indians.

Sec. 8. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said

Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided: *Provided*, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Reservation, in South Dakota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, March 2, 1907.

Act of May 30, 1910 ch. 260, 36 Stat. 448

CHAP. 260.—An Act To authorize the sale and disposition of a portion of the surplus and unallotted lands in Mellette and Washabaugh counties in the Rosebud Indian Reservation in the State of South Dakota, and making appropriation and provision to carry the same into effect.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washabaugh, south of the White River, and being described and bounded as follows: Beginning at a point on the third guide meridian west where the township line between townships thirty-nine and forty intersects the same, thence north along said guide meridian to the middle of the channel of White River, thence west along the middle of the main channel of White River to the point of intersection with the line dividing the Rosebud and the Pine Ridge Indian reservations, thence south along the boundary line between said reservations to the township line separating townships thirty-nine and forty, thence east along said township line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: *Provided,* That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for

sale, relinquish same and select allotments in lieu thereof on the diminished reservation: *And provided further,* That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: *And provided further,* That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority, of any religious organization heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any townsite hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

SEC. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided,* That prior to said proclamation the allotments within the portion of the said Rosebud Reservation to be disposed of as prescribed herein shall have been completed: *Provided further,* That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Phillippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

SEC. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town-site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town-sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses or other public buildings or in improvements within the town-sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town-sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other public buildings or improvements, shall be credited to the Indians, as hereinafter provided.

SEC. 4. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement, as herein provided. The President

dent shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been alloted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: *Provided*, That timber lands may be classified without regard to acreage: *And provided further*, That all lands classified as timber lands shall be reserved for the use of the Rosebud Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and appraisement of said lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisement

to be completed within six months from the date of organization of said commission.

SEC. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior; and after the completion of the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

SEC. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments, to be paid in two, three, four, five, and six years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands

entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

SEC. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

SEC. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That in any event not more than two sections shall be granted to

the State in any one township, and lands must be selected in lieu of sections sixteen or thirty-six, or both, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

SEC. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this Act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisement and classification provided for herein: *Provided*, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

SEC. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

SEC. 11. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said land except as provided

herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, May 30, 1910.

Supreme Court, U. S.
FILED
MAY 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-6290

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

GLEN D. DUPRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. "A" 1-51) is reported at 612 F.2d 319. The opinion of the district court (Pet. App. "B" 1-84) is reported at 453 F. Supp. 1171.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1979, and a petition for rehearing was dismissed on January 18, 1980.[1] A second petition for rehearing was filed on March 24, 1980. On April 14, 1980, the court of appeals vacated its January 18 dismissal order and denied the second petition for rehearing. The petition for a writ of certiorari was filed on March 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

1/ The procedural history of this case is somewhat unusual. On January 18, 1980, the court of appeals dismissed the petition for rehearing after having been apprised of a letter dated December 12, 1979, in which petitioner apparently instructed his counsel not to file a petition for rehearing. On January 24, 1980, petitioner's counsel moved to vacate the dismissal. That motion was denied on February 11, 1980. Thereafter, on March 17, 1980, the district court held an evidentiary hearing to inquire into the circumstances surrounding petitioner's apparent withdrawal of the petition for rehearing and concluded that that withdrawal had not been petitioner's "free, voluntary and intelligent act." In light of the district court's findings, a second petition for rehearing was filed on March 24, 1980. On April 14, 1980, the court of appeals recalled its mandate, vacated its order of January 18, 1980, and denied the second petition for rehearing. In the interim, petitioner had moved, on February 19, 1980, for an extension of time in which to file his petition for a writ of certiorari. On February 21, 1980, Mr. Justice Blackmun extended the time for petitioning until March 20, 1980, "without prejudice to the Court's consideration of whether [the] application [had] been filed on time."

QUESTION PRESENTED

Whether the western portion of the Cheyenne River Indian Reservation, opened up to entry in 1908, remains "Indian Country" for purposes of a federal prosecution under the Major Crimes Act.

STATUTES INVOLVED

The Act of May 29, 1908, 35 Stat. 460, is reproduced at Pet. App. "C" 1-5. The Act of February 17, 1910, 36 Stat. 196 is reproduced at Pet. App. "C" 6-7.

STATEMENT

On June 1, 1977, petitioner Glen D. Dupris, a Sioux Indian, was charged in the United States District Court for the District of South Dakota with burglary and larceny at a retail store in Eagle Butte, South Dakota, in violation of the Major Crimes Act, 18 U.S.C. 1153, which provides for exclusive federal jurisdiction over certain crimes committed by Indians in "Indian country."[2] See United States v. John, 437 U.S. 634 (1978).

2/ 18 U.S.C. 1153 provides in relevant part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely * * * burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. * * *

(Footnote continued on next page)

On October 5, 1977, petitioner moved to dismiss the information on the ground that Eagle Butte was not "Indian country."

It is undisputed that Eagle Butte lies within the original boundaries that were established for the Cheyenne River Reservation in 1889.[3/] In 1908, Congress opened up the western portion of this reservation, including Eagle Butte, for white settlement. Act of May 29, 1908, 35 Stat. 460. The 1908 Act is one of numerous statutes that Congress enacted after the turn of the century, all of which had the purpose of opening up surplus Indian lands for white settlement. To that end, however, various means were adopted, and it is common ground that "[s]ome surplus land statutes have operated to disestablish or diminish

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(Footnote continued from preceding page)
18 U.S.C. 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinquished, including rights-of-way running through the same.

3/ The Great Sioux Reservation, which encompassed twenty-five million acres, was established by the Treaty of April 29, 1868, 15 Stat. 635. In 1877, Congress severed 7.5 million acres in the Black Hills region. Act of February 28, 1877, 19 Stat. 254. See United States v. Sioux Nation, No. 79-639 (argued March 24, 1980). In 1889, the Sioux ceded an additional eleven million acres, and the remaining reservation area was subdivided into six separate reservations, one of which was the Cheyenne River Reservation. Act of March 2, 1889, 25 Stat. 888.

the size of the reservations, while others have left unaffected the reservation boundaries." United States v. Long Elk, 565 F.2d 1032, 1035 (8th Cir. 1977) (footnotes omitted). The question here is whether the 1908 Act was one of those that had the effect of "disestablishing" a portion of the reservation.

On June 29, 1978, the district court so held and accordingly granted petitioner's motion to dismiss (Pet. App. "B"). The government appealed and the Eighth Circuit reversed, with one judge dissenting. That court examined the language of the 1908 Act, as well as its history and surrounding circumstances, and concluded that federal jurisdiction had been properly invoked because the relevant materials did not demonstrate a clear disestablishment intent (Pet. App. "A").

ARGUMENT

At the outset, we note that there is no longer a truly live controversy between the parties. The issue sought to be presented has no practical consequence for petitioner because, on May 2, 1980, the United States Attorney for the District of South Dakota moved to dismiss, with prejudice, all pending charges against petitioner. Notwithstanding the action of the United States Attorney, petitioner has declined to withdraw the present petition and the district court has declined to rule on the government's motion pending this Court's action on the petition. See Fed.R.Crim.P. 48(a).[4/] Accordingly, although

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4/ Although the United States Attorney intended that the dismissal should be with prejudice, his May 2 motion omitted to so provide in terms. Consequently, an amended motion was filed

(Footnote continued on next page)

the case is not moot, as a technical matter, we submit that this Court ought not entertain on the merits a petition for certiorari to review a decision that cannot adversely affect the applicant.

In any event, the petition is without merit. The contention is that the Eighth Circuit's holding is inconsistent with this Court's decisions in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and DeCoteau v. District County Court, 420 U.S. 425 (1975). But, obviously, a difference in result does not necessarily demonstrate a conflict. Given the diversity of statutory formulations that Congress has used to open up Indian lands, the question can always be raised whether the relevant statute has disestablished or diminished a particular reservation or simply opened it to settlement. In each case, that question is essentially fact-bound; it can be answered only be reference to the language and circumstances of a particular Act. Accordingly, this Court has developed principles of statutory construction to establish uniformity in this complex area. See Rosebud Sioux Tribe v. Kneip, supra; DeCoteau v. District County Court, supra; Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). In this case--as in Rosebud itself--the

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(Footnote continued from preceding page)

on May 6, 1980, which motion asks that the information be dismissed "with prejudice on the grounds and for the reasons that nearly three years have elapsed since this suit was filed. Significant items of evidence have been lost or misplaced during that time, witnesses' memories have faded in the interim, and, therefore, the interests of justice will be best served by dismissing said Information." A copy of the government's motion is attached hereto as "Appendix A." The United States Attorney having re-evaluated his case and having determined that petitioner's prosecution is no longer viable, it is hardly conceivable that the government's motion should not be granted in due course. See United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976).

Eighth Circuit properly applied those principles,[5/] and petitioner's claim warrants no further review.

1. Whether a reservation has been disestablished in whole or in part depends upon congressional intent. The mere fact that lands have been opened for settlement "does not necessarily mean that the opened area has lost its reservation status." Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 586-587. Accord Mattz v. Arnett, supra, 412 U.S. at 496; Seymour v. Superintendent, supra, 368 U.S. at 356. Disestablishment will be found only if such an intent is clear on the face of the statute or from surrounding circumstances and legislative history (Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 586; Mattz v. Arnett, supra, 412 U.S. at 505), and any ambiguity must be resolved against disestablishment. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973). The court below applied that test and concluded that "[h]ere a congressional intent to diminish Indian land, rather than to merely open it to settlement, is not clear. In fact, the opposite conclusion is as easily reached" (Pet. App. "A" 6).

5/ Petitioner apparently attributes some significance to the fact that the Court has found disestablishment in the last two cases in which it has considered the issue (see Rosebud Sioux Tribe v. Kneip, supra; DeCoteau v. County District Court, supra). In Rosebud and DeCoteau, however, this Court expressed no intention to overrule its earlier decisions. Nor do the cited cases cast any shadow on the Eighth Circuit's decision in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), which was approved in Mattz v. Arnett, supra, 412 U.S. at 505 n.23, and which decided the precise issue presented in this case. See also United States v. Long Elk, supra, 565 F.2d at 1036 n.10.

The court of appeals first examined the language of the 1908 Act and properly concluded that "no congressional determination to terminate is expressed in the statute which opened the lands in and around Eagle Butte" (Pet. App. "A" 5).[6/] Consistent with this Court's prior decisions, the court of

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6/ In DeCoteau v. District County Court, supra, 420 U.S. at 445, this Court noted that certain language is "precisely suited to [the] purpose [of disestablishment]." That language, which generally speaks in terms of "cession," does not appear in the 1908 Act. Only two provisions of the 1908 Act provide any arguable suggestion of disestablishment intent.

First, Section 7 of the Act sets aside two sections of each township for common school purposes. In affirming the Eighth Circuit's decision in Rosebud, this Court noted that a similar provision supplied some indication of disestablishment intent. Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 599-601. In Rosebud, however, the Court had previously found that the reservation had been disestablished by a 1901 Act, and its inquiry with respect to the school lands provision was made in the context of determining whether a 1904 Act, which contained the school lands provision, demonstrated a contrary intent. That is not the situation here. Moreover, the rationale for the school lands provision in the 1908 Act is obvious. Once the reservation was opened, schools would have to be provided for white children, regardless whether the reservation was to be disestablished. That Congress provided for that need in the same manner that it had previously used in a more general context demonstrates only that it chose to follow a previously tested method. The court of appeals considered that factor in its proper perspective: "Certainly, some weight should be given to the school argument, but there was a similar provision in the act considered in Long Elk and we held that it was of minimal importance in light of the entire record" (Pet. App. "A" 8).

Second, Section 8 of the Act, as amended in 1910, bans the use of intoxicants within the opened area. But that is very weak evidence of disestablishment intent. In 1910, the Indians specifically requested the addition of this provision, which made federal liquor laws applicable to all reservation lands held by non-Indians, "whether those lands were opened to settlement by the 1908 Act or not" (Pet. App. "A" 8). Obviously, this at least partially redundant provision is ambiguous.

The 1908 Act also contains two minor transitional provisions that are even less persuasive. Section 2 allowed Indians to relinquish allotments in the opened area in exchange for new allotments within "the reservation, thus diminished," and Section 9 provided that Indians residing upon allotments in specified townships would have the right to use timber there "only so long as the lands remain part of the public domain." In the absence of express disestablishment or cession language, these references may create some ambiguity, but they evince no clear disestablishment intent.

appeals proceeded to consider the legislative history and surrounding circumstances.

The Eighth Circuit found that the legislative history of the 1908 Act was also inconclusive (Pet. App. "A" 8). There are ambiguous references to both "cession" and "opening." See, e.g., S. Rep. No. 439, 60th Cong., 1st Sess. (1908) (parts 1 and 2) and H.R. Rep. No. 1539, 60th Cong., 1st Sess. (1908)).[7/] Moreover, the court properly concluded, as it had in United States ex rel. Condon v. Erickson, 478 F.2d 684, 688 (8th Cir. 1973), that "the subsequent Congressional treatment of the reservation has been inconsistent." Shortly after passage of the 1908 Act, Congress had occassion to refer to the opened lands. On some occasions, Congress referred to them as the "Cheyenne River Reservation;" on other occasions, language indicative of disestablishment was used. See Act of June 23, 1910, 36 Stat. 602; Act of May 28, 1914, 38 Stat. 384; Act of March 4, 1921, 41 Stat. 1446-1447. See also H.R. Rep. No. 1046, 61st Cong., 2d Sess. 1 (1910); S. Rep. No. 723, 61st Cong., 2d Sess. 1 (1910); 45 Cong. Rec. 5799-5810 (1910).[8/]

So, also, the court of appeals found no clear indication of disestablishment intent in the surrounding circumstances. Unlike the presidential proclamation opening up the Rosebud reservation (Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 602-603), which clearly stated an intent to disestablish, the presidential proclamation that opened the Cheyenne River Reservation simply provided that "all nonmineral, unallotted, unreserved lands within the Cheyenne River * * * Reservation[] * * * shall be disposed of * * * and be opened to settlement

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7/ Moreover, the "cession" language in the legislative history is generally attributable only to the agent who "negotiated" with the Indians and to the South Dakota legislators who sought the opening up of this territory. There is no indication that those views were shared by the Congress as a whole (See Pet. App. "A" 5-6).

8/ Administrative references to the opened area have also been inconsistent (see Pet. App. "A" 42-43 (McMillian, J., dissenting)).

and entry * * *" (Proclamation of August 19, 1909, 36 Stat. 2500). Nor was there, in this instance, an agreement between the government and the Indians concerning disestablishment. Compare Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 598 n.20; United States v. Long Elk, supra, 565 F.2d at 1039. And, finally, the subsequent jurisdictional treatment of the area does not clearly show disestablishment.[9/] As the court of appeals pointedly observed here, the subsequent jurisdictional history provides little assistance (Pet. App. "A" at 9):

> In our view, [the] history can be read in about any way the reader likes. Simply stated, South Dakota has, at times, asserted criminal jurisdiction over this and other reservations and, at times, it has not.

In short, the court of appeals carefully followed the principles established in this Court's prior decisions. Petitioner's claim warrants no further review.

2. The State of South Dakota and certain of its political subdivisions have filed a brief amicus curiae urging that the petition be granted. In addition to the arguments set forth in the petition, they note that the Eighth Circuit's decision apparently conflicts with the South Dakota Supreme Court's decision in Stankey v. Waddell, 88 S.D. 104, 256 N.W.2d 117 (1977). While Stankey does indeed construe the Act of 1908 as having disestablished a part of the Cheyenne River Reservation, it is far from clear that this conflict will survive the present

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9/ In Rosebud, this Court relied upon the fact that "the State [had] exercised unquestioned jurisdiction over the disputed area since the passage of the enactment--an indication of the intended purpose of the Act that was not present in Mattz v. Arnett, 412 U.S., at 505." Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 598-599 n.20. Accord DeCoteau v. County District Court, supra, 420 U.S. at 442. Compare United States v. Long Elk, supra, 565 F.2d at 1039; United States ex rel. Cook v. Parkinson, 525 F.2d 120, 122 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

ruling. Indeed, it is perhaps unlikely that the South Dakota Supreme Court would choose not to follow the Eighth Circuit's decision in the future, on this federal law question. At all events, it is premature to assume that a conflict requiring resolution by this Court will be presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

ROBERT L. KLARQUIST
JAMES J. TOMKOVICZ
Attorneys

MAY 1980

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

United States of America,

Plaintiff,

vs.

Glen D. Dupris,

Defendant.

CR 77-30056-01

AMENDED MOTION AND ORDER TO DISMISS INFORMATION

Comes now the United States of America and moves the Court for an Order dismissing the Information in the above-entitled matter against the defendant Glen D. Dupris with prejudice on the grounds and for the reasons that nearly three years have elapsed since this suit was filed, significant items of evidence have been lost or misplaced during that time, witnesses' memories have faded in the interim, and, therefore, the interests of justice will be best served by dismissing said Information.

Assistant United States Attorney

O R D E R

Upon the foregoing Motion and for good cause showing, it is hereby

ORDERED that the Information in the above matter be and the same is hereby dismissed with prejudice as against the defendant Glen D. Dupris.

Dated this ____ day of _____, 1980.

BY THE COURT:

United States District Judge

ATTEST:

WILLIAM J. SRSTKA
Clerk

By_____
Deputy

(SEAL)

MAY 29 PAGE 7

Supreme Court, U.S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6290

GLEN D. DUPRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

This brief is submitted in order to respond to the arguments made by the United States and the Cheyenne River Sioux Tribe in their briefs in opposition to the Petition for Writ of Certiorari. As is explained below, these arguments are not persuasive and do not reduce the strength of the reasons for granting the writ set forth in the Petition. While the Government has filed a motion to dismiss the criminal charges in this matter, this motion has not yet been ruled upon by the District Court. Therefore, although counsel for the petitioner does not wish to press needless arguments, the jurisdictional issue must be fully presented to the Court in order to protect the rights of the petitioner and to pursue every available defense on his behalf.

I. THE ARGUMENTS OF THE UNITED STATES AND THE TRIBE ON THE ISSUE OF DISESTABLISHMENT ARE NOT PERSUASIVE IN LIGHT OF UNAMBIGUOUS CONGRESSIONAL INTENT AND THE DECISIONS OF THIS COURT.

The United States places heavy emphasis on the purported existence of ambiguities in the statutory language and legislative history and restates the rule that doubtful expressions are to be resolved in favor of the Indians. See Brief of United States at 6; Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973). However, it must be remembered that the rule is simply a "canon of construction" and "is not a license to disregard clear expressions of ... congressional intent. DeCoteau v. District County Court, 420 U.S. 425, 447 (1975). In the instant case as stated in the Petition, the evidence taken as a whole is overwhelming and demonstrates an unmistakable congressional intent to disestablish the portion of the original Cheyenne River Reservation affected by the Act of May 29, 1908, 35 Stat. 460.

The United States attempts to minimize the importance of the express language of the Act in question. It first discounts the significance of the school lands provision found in Section 7 of the Act, despite the emphasis placed on identical provisions in Rosebud Sioux Tribe v. Kneip, supra at 599-601. The "obvious" rationale for the provision asserted by the Government, Brief of United States at 7 n.6, is imaginative but has no support in any of the legislative material. What is in fact obvious is that the reason for the provision is precisely the same as that stated in Rosebud. Here, as in Rosebud, the House Report explicitly stated the reason for the provision: "Sections 16 and 36 are reserved as school lands for the States of North Dakota and South Dakota, which is in accordance with the enabling acts of

these States." [1] The conclusion drawn by this Court with respect to similar legislative material regarding the 1904, 1907, and 1910 Rosebud Acts was that

> Congress, therefore, clearly thought that it was acting pursuant to § 10 of the Act of February 22, 1889, and not sub silentio adding an additional grant for school lands located within a continuing reservation. The far more natural construction, then, is to read a congressional intent to disestablish [the affected area].

Rosebud, supra at 600-01 (emphasis added). [2]

Similarly, the arguments of the United States and of the Cheyenne River Tribe regarding the liquor provision, added to the 1908 Act by subsequent amendment, are misleading. See Brief of United States at 7 n.6; Brief of Tribe at 17-18.

1/ The following exchange during the debate of the bill in the House is also helpful in interpreting the provisions:

> MR. FINLEY. ... In Section 7 of the bill it provides that sections 16 and 36 are to be reserved for school purposes.... When the State of South Dakota was made a State, was or not the State of South Dakota given school lands or lieu lands for school purposes to correspond with the amount of Indian lands held by Indians in reservations like this?
>
> ....
>
> MR. SHERMAN. A provision was made in the enabling act that the United States grant to the States sections 16 and 36 for school purposes.
>
> ....
>
> MR. HALL. I will say that the enabling act under which South Dakota, North Dakota, Washington, and Montana were admitted - it was an omnibus bill - provided for the granting in presenti of sections 16 and 36 for school purposes, and then it provided that grant of these sections for school purposes be held in abeyance until the reservation was opened.

42 Cong. Rec. 7005 (1908).

2/ The statements of the United States regarding the issues in the Rosebud case are incorrect. The reservation was not disestablished by a 1901 act, and the question involved was whether the reservation was diminished by three separate statutes: A 1904 Act (incorporating the terms of an unratified 1901 agreement), a 1907 Act, and a 1910 Act. The Court arrived at the same conclusion regarding the school lands provision in all three Acts. 430 U.S. at 599-601, 608 n.36, 613.

The 1910 request by the Indians for a ban on intoxicants was made in the context of different proposed legislation which was designed to open up the remainder of the original reservation left unopened by the 1908 Act. See Letter from Secretary of the Interior to Chairman of Senate Committee on Indian Affairs (April 5, 1910), reproduced in S.Rep. No. 518, 61st Cong., 2d Sess. at 4 (1910). [3] Since the entire diminished reservation was affected by this opening, and probably would be disestablished as a result, it is only logical that the Indians would request that the bill include a liquor ban covering "any part of the present reservation." Id. The liquor provision added to the 1908 Cheyene River Act is nearly identical to that included in the 1910 Rosebud Act which has been fully interpreted by the Court in Rosebud, supra at 613-15 and n.47. Moreover, the legislative history of the provision clearly shows that it was adopted for precisely the same reasons explained in Rosebud. [4] See 45 Cong. Rec. 1769-70 (1910); H.R.Doc. No. 711, 61st Cong., 2d Sess. (1910).

The Government's brief dismisses the "diminished" and "public domain" language of the statute without explanation. Brief of United States at 7 n.6. The use of these terms, however, is the clearest evidence of a congressional intent

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3/ This letter does contain references relevant to the question at hand. The unopened portion of the original reservation is described as the "diminished part of the reservation," and as comprising "all of the Cheyenne River Reservation." S.Rep. No. 591, 61st Cong., 2d Sess. at 4-5 (1910) (emphasis added).

4/ In a letter to the Speaker of the House recommending such a provision, the Secretary of the Interior stated that the suggested legislation was "similar" to that affirmed in Dick v. United States, 208 U.S. 340 (1908). See H.R. Doc. No. 711, 61st Cong., 2d Sess. at 1 (1910). The provision considered in the Dick case, as explained in Rosebud, supra at 613-15 n.47, was a liquor ban pertaining to lands which were ceded by Indians and thereby removed from the coverage of the Act of July 23, 1892 prohibiting the introduction of liquor into Indian country. See Dick, supra at 352-54.

to disestablish the opened portion of the reservation. If Congress had intended that the reservation continue to extend to its 1889 boundaries, it certainly would not have referred to it as "diminished." 5/ Cf. Rosebud, supra at 613-14; Seymour v. Superintendent, 368 U.S. 351, 354 (1962). Moreover, there is no merit in the assertion of the Government that the reference in the 1908 Act to the opened lands as being "part of the public domain" does not indicate disestablishment intent. This Court has consistently interpreted the restoration of land to the public domain to be synonymous with disestablishment. Rosebud, supra at 589 and n.5; DeCoteau v. District County Court, 420 U.S. 425, 448-49 (1975); Seymour, supra at 353, 354-55.

The contrary arguments made by the Government and the Tribe are not persuasive. Both point to the asserted lack of a formalized agreement between the Indians and the Government. Brief of United States at 9; Brief of Tribe at 14-15. However, this argument has been fully disposed of by this Court in Rosebud:

> although the Acts of 1904, 1907, and 1910 were unilateral Acts of Congress without the consent of three quarters of the members of the tribe required by the original treaty, that fact does not have any direct bearing on the question of whether Congress by these later Acts did intend to diminish the reservation boundaries. By the time of the first of these Acts, in 1904, Congress was aware of the decision of this Court in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), which held that Congress possessed the authority to unilaterally later the provisions of an Indian treaty.

5/ Despite the plain and ordinary meaning of the word, the Tribe suggests that to "diminish" a reservation is not to decrease its size but to alter the status of some of its land. Brief of Tribe at 17. This fanciful construction, however, does not comport with this Court's own understanding and use of this term in similar contexts. See Rosebud, supra at 585, 586, 587, 588, 592, 594, 597, 598, 611, 613; DeCoteau v. District County Court, 420 U.S. 425, 447 (1975); Seymour v. Superintendent, 368 U.S. 351, 354 (1962).

Rosebud, supra at 587-88. See also id. at 593-94, 598, 607 n.32. As in Rosebud, Congress was aware that it was acting pursuant to its plenary power affirmed in Lone Wolf:

> Although Congress has the plenary power to open the lands independent of the consent or agreement of the Indians, it has been thought wise to consult their wishes and conform thereto as nearly as may be consistent with their own interest and the welfare of the people as a whole.

S.Rep. No. 439, 60th Cong., 1st Sess. at 4 (1908); H.R.Rep. No. 1539, 60th Cong., 1st Sess. at 3 (1908). See also S.Rep. No. 439, supra, Pt. 2 at 4-5, 18; H.R.Rep. No. 1539, supra at 8-9, 22. Cf. S.Rep. No. 68, 61st Cong., 2d Sess.(1910) (similar provision regarding 1910 Rosebud legislation). Furthermore, as in Rosebud, some form of unwritten agreement was reached with the members of the Tribe. See S.Rep. No. 439, supra at 4.

The Tribe also relies on the absence of explicit language of cession in the 1908 Act. Brief of Tribe at 15. However, since there was no actual "cession" involved in the strict meaning of the word, see Rosebud at 597, the absence of such language is not relevant. There is, for instance, no such language in the 1907 Rosebud Act found by this Court to have the effect of disestablishment. See Rosebud at 608-09. Moreover, the numerous references to the "cession" of the lands in question, contained in Indian Inspector McLaughlin's report of his conferences with the Indians - which is expressly made a part of both the House and Senate Reports - indicate that it was understood at the time that the Act would have the same effect as a cession by the Indians. See S.Rep. No. 439, Pt. 2, 60th Cong., 1st Sess. (1908); H.R.Rep. No. 1539, 60th Cong., 1st Sess. at 5-28 (1908).

The Tribe seems to argue that because the Secretary of the Interior was authorized to reserve certain lands for agency, school, and religious purposes, that these areas remained a part of the reservation and it would have been inconsistent to have disestablished other portions opened to settlement. If this is indeed the Tribe's interpretation, it is incorrect. The purpose of the 1908 Act was clearly to disestablish all lands within the portion of the original reservation affected by the Act. The provision in question simply reserves some lands from sale to homesteaders, just as the preceding provision reserves sections 16 and 36 from sale so that the necessary school lands grants could be made to the States. In addition, an identical provision appears in the 1910 Rosebud Act which was held in Rosebud to disestablish the area affected by the Act. Similarly, the fact that coal lands were reserved from allotment or disposition (Brief of Tribe at 16), is irrelevant to the issue of disestablishment. Similar provisions in the 1910 Pine Ridge and Rosebud Acts reserved timber lands to the use of the Indians. § 4, Act of May 27, 1910, 36 Stat. 440 (Act construed in United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); § 4, Act of May 30, 1910, 36 Stat. 448.

As stated in the Petition, the legislative history of the 1908 Act leaves no room for doubt as to the intended effect of the Act. The lack of references to the effect of the Act in the congressional debates is simply indicative of the fact that it was commonly understood that the legislation would disestablish the opened area. United States v. A Juvenile, 453 F. Supp. 1171, 1189 (D.S.D. 1978). See United States v. Dupris, 612 F.2d 319 (8th Cir. 1979) (McMillian, J., dissenting).

This understanding is plainly evident from the text of the Senate Reports which contain references to the "reservations as diminished" and "the reduced reservations," and in the additional material made a part of both committee reports, which includes unequivocal references to the cession of lands, new boundary lines, and diminished reservations. See S.Rep. No. 439, 60th Cong., 1st Sess. at 4-5, and Pt. 2, passim (1908); H.R.Rep. No. 1539, 60th Cong., 1st Sess. at 3, 5-28 (1908).

The foregoing does not stand alone, however. The legislative history must be read in the context of other surplus land acts passed during the same period affecting other reservations in South Dakota. See Act of March 2, 1907, 34 Stat. 1230 (Rosebud Reservation); Act of May 27, 1910, 76 Stat. 440 (Rosebud Reservation); Act of May 30, 1910, 36 Stat. 448 (Pine Ridge Reservation). These three statutes are virtually identical in substance and language to the 1908 Cheyenne River Act, and each has been found to have disestablishment effect. See Rosebud, supra; United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). The arguments pressed by the United States and the Tribe are therefore not only based on a strained reading of the Act and its history, but on the purely speculative assertion that, despite evidence to the contrary, Congress intended a completely different result from that of other acts of the period utilizing the same language. While it is true, as the Government notes, that each act of this type must be examined separately, the scope of the judicial inquiry mandated by the decisions of this Court requires a broad examination of the circumstances surrounding the passage of the Act. Rosebud, supra at 587; DeCoteau, supra at 444. Therefore, the Act in question must be examined against the background provided by these other similar statutes affecting nearby reservations. See United States v. Dupris, supra at 336 (McMillian, J., dissenting).

The arguments of the Government and the Tribe regarding the subsequent jurisdictional history of the area in question are also without merit. As explained in the amicus brief of the State of South Dakota, et al., the State and Counties exercised continuous jurisdiction over the area in question until the 1973 decision of the Eighth Circuit in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). Brief of South Dakota et al. at 13-14. See United States v. Dupris, supra at 338-39 (McMillian, J., dissenting). In addition, the statement of the Tribe that "[w]ithout exception those areas previously opened to settlement by the 1908 legislation have been consistently administered by the federal government and the Tribe as part of the Cheyenne River Reservation" Motion of Tribe at 2, is simply untrue. The absence of federal jurisdiction in the area opened in 1908 was recognized very early, as evidenced in the following passage from the 1911 report of the Superintendent of the Cheyenne River Agency:

> The law opening this reservation practically created a community without law or officers to enforce the law, as it left the open land outside of the allotments beyond my jurisdiction and nearly a year passed before there was any semblance or assumption of jurisdiction by the state or county organizations.

Annual Report of Supt. of Cheyenne River Agency, Section I, No. 3, "Maintenance of Order", at 1 (1910) (copy attached hereto as Appendix A) (emphasis added).[6/] Moreover, if the

6/ Other documents of the Department of the Interior reflect the same understanding. For example, a 1912 letter from the Agency Superintendent describes boundaries of the reservation "prior to the opening" and then describes the "boundaries of the present diminished reservation." Letter of Superintendent of Cheyenne River Agency to P. Norbeck (August 12 1912) (copy attached hereto as Appendix B). Another letter from the Superintendent in 1913 refers to the application of state law to both "the ceded part of the reservation" and "the present diminished reservation." Letter of Superintendent of Cheyenne River Agency to Attorney General of South Dakota (February 13, 1913) (copy attached hereto as Appendix C). In addition, a 1929 letter from the Secretary of the Interior refers to the opened land as the "former" reservation. Letter from Secretary of the Interior to Rep. William Williamson (July 29, 1929) (a copy attached hereto as Appendix D).

federal government had exercised general criminal jurisdiction, it would have done so in contravention of the decision of the United States District Court in United States v. LaPlant, 200 F. 92 (D.S.D. 1911). This is not to say that the federal government exercised no jurisdiction in the area, for it certainly involved itself in the enforcement of federal criminal laws, such as those relating to the sale of liquor (see, e.g., Act of January 30, 1897, 29 Stat. 506), and to theft of government property (see 18 U.S.C. 641), in reservation and non-reservation areas alike. Also, a considerable portion of the area in question was initially held as Indian allotments, which were "Indian country" for jurisdictional purposes and which would therefore have been subject to federal jurisdiction even though outside the reservation. See United States v. Dupris, supra at 339-40 (McMillian J., dissenting); United States v. A Juvenile, supra at 1200. See generally United States v. Pelican, 232 U.S. 442, 447 (1914); 18 U.S.C. 1151(c). In addition, the federal government has extended programs and benefits to Indians in the opened area, but, as explained in the opinion of the District Court, this fact is not germane to the issue of disestablishment. United States v. A Juvenile, supra at 1176, 1200-01.

Furthermore, in 1941 and 1952 undisposed of-lands in the opened area were restored to reservation status by the Department of the Interior under Sections 3 and 7 of the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § § 461 et seq. (Indian Reorganization Act). Order of Restoration, 41 Fed. Reg. 4903 (1941); Order of Restoration, 52 Fed. Reg. 1065 (1952). Those lands are referred to in the orders as part of the "former" reservation and the "ceded" lands. The Department of the Interior clearly considered the lands opened by the 1908 Act to be outside the reservation; otherwise it would have made no sense to have expressly added portions of the opened area to the existing reservation under § 7 of the Indian Reorganization Act.

The Tribe cites several statutes which it claims are representative of congressional recognition of the reservation status of the lands opened by the 1908 Act. Brief of Tribe at 20 n.5. To the extent that subsequent statutes are relevant to the issues at hand, it should be noted that numerous statutes clearly indicate an understanding that the reservation was in fact diminished.[7/] See, e.g., Act of April 13, 1912, 37 Stat. 84; Act of April 25, 1922, 42 Stat. 499; Act of March 3, 1925, 43 Stat. 1184; Act of March 31, 1928, 45 Stat. 400; Act of February 14, 1931, 46 Stat. 1107. Cf. Rosebud, supra at 604-05 n.27 ("often contradictory" history of "little force").

II. A CONFLICT EXISTS BETWEEN THE DECISIONS OF THE EIGHTH CIRCUIT COURT OF APPEALS AND THE SOUTH DAKOTA SUPREME COURT.

The Government attempts to minimize the conflict existing between the opposite decisions of the South Dakota Supreme Court in Stankey v. Waddell, 88 S.D. 104, 256 N.W.2d 117 (1977) and of the Eighth Circuit in the instant case. Brief of United States at 9-10. Their suggestion that the South Dakota court will reverse itself is purely speculative, and the fact remains that a conflict in need of resolution does exist.

7/ The statutes referred to by the Tribe are not apposite. The Act of September 30, 1950 in no way relates to the lands in question. Other acts refer to the opened lands as "in the" reservation. In light of the unambiguous references to the "former reservation" in other statutes, it must be assumed that the above reference was a convenient geographical designation rather than a recognition of reservation status.

The two Interior Department documents cited by the Tribe are also not relevant. The 1909 reference to lands "within the" reservation was written before the actual sale of the opened lands, when the disestablished area was still administered by the federal government as if it were a reservation. See United States v. Pelican, 232 U.S. 443, 449 (1914). The 1910 letter simply refers to "Cheyenne River lands."

III. A CASE OR CONTROVERY BETWEEN THE PARTIES STILL EXISTS.

The Government also argues that the Petition should be denied because the United States Attorney has moved to dismiss the case against the petitioner, and states that such a denial "cannot adversely affect" the petitioner. Brief of United States at 4-5. This argument is without merit. Since the Government's motion has not yet been ruled upon by the District Court, and there is no guarantee that the court will grant the motion, any suggestion that the case is moot is also purely speculative. Until the case is dismissed with prejudice, the petitioner is still in jeopardy.

CONCLUSION

For the foregoing reasons, and the reasons expressed in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

David L. Bergren
P.O. Box 7
Fort Pierre, South Dakota 57532

Attorney for Petitioner

AFFIDAVIT OF SERVICE

I hereby certify that the foregoing Reply Brief of Petitioner was served this 27th day of May, 1980, by United States Mail, first-class postage prepaid, addressed to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

William W. Shakely
William W. Shakely

Subscribed and sworn to before me this 27th day of May, 1980.

Gayle Farnsworth
Notary Public

My Commission Expires March 14, 1983

SECTION I--Law and Order

No. 3. Maintenance of Order.

Disorder upon the reservation during the year has consisted of the disturbances of the Indians on one side and troubles which have been caused by the whites on the other side. Last July, I found the Indians of this reservation practically without discipline, but immediate action to strengthen the authority of the police and courts and a little severe disciplining has brought conditions to a point where I feel there will be but little trouble in maintaining discipline among our own people except for such chronic cases as are found in every community. The chronic cases we arrest, try and commit to jail and when their time is up we look for their absence from jail to be very temporary.

The greatest diffuculty in maintaining order has been on account of the towns and the whites on the open part, and this divides itself into the disturbances in the towns and the depredations on stock and timber.

The law opening this reservation practically created a community without law or officers to enforce the law, as it left the open land outside of the allotments beyond my jurisdiction and nearly a year passed before there was any semblance or assumption of jurisdiction by the state or county organizations. Towns sprung up even before the lot sales and from the start until recently, gambling and drinking went on at a great rate. These features were eliminated during the last month of the year

by Special Officer D. L. Crowder, whose services as detective I obtained through Chief Special Officer Johnson. I cannot speak too highly of the most excellent work which was done by Mr. Crowder, as through his efforts, gambling and drinking has been practically eliminated. Many prosecutions for selling intoxicants will be had in the fall and the traffic in hard cider, which was probably the greatest annoyance, has been eliminated, so that we will go into the coming year with a set of towns probably as clean as on any reservation, and I believe they will remain so except for the occasional bootlegger whose audacity would lead him to peddle booze in heaven if the money gain seemed sufficient to justify the attempt.

The horse and cattle stealing and the timber stealing has been the most difficult with which to cope and along these lines the least has been accomplished. At the fall term of Court I will present to the Grand Jury quite a number of these cases, but that number will be insignificant compared with the terrible depredations on stock and timber which have been carried on during the year. The necessity of furnishing the Court with the most techinal evidence as to the actual taking of the property and the extensive territory over which these depredations have extended have rendered my regular force almost helpless to catch these people redhanded, while the many other duties and the time which would have been consumed in travel have made it equally impossible for the regular employees to run down the cases and develop the evidence. I know many of the stock thieves and their offences and a great many of the timber depredations and the persons by whom they were committed, but we are unable because of other duties and lack of special training along these lines to produce

the evidence necessary to convict. Request by telegram on June 27th, was made on the Office to continue Mr. Crowder's services for a few months so that constant hammering would insure us against the backsliding of the towns and principally to employ him in obtaining the necessary evidence to the stock and timber depredations. The remedy for all conditions on this reservation is to increase the police force to not less than thirty men including officers, and to allow the services of Mr. Crowder for a few months longer.

The difficulties on this reservation are due almost entirely to the manner in which it was opened for settlement, I would urge upon the Office either to find a better system for settling up the surplus lands on Indian reservations or, if the present method is to be followed, a more carefully prepared law which will not practically create, even temporarily, a territory without either law or officers for the enforcement of the law. As a suggestion, it occurs to me that the country would be better settled by a law that would permit the sale of surplus lands as we now sell inherited lands, the jurisdiction to be ceded to the state at such a time as the white settlement justifies such cession or, under the present form, a provision to be written into the law which will retain in the Indian service and its officers, absolute jurisdiction over the territory opened for settlement until such time as the Secretary of the Interior is satisfied that the state, counties and towns have established systems of local government and officers competent to enforce the law.

DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN SERVICE

Cheyenne River Agency, S. D.,
August 12, 1912.

Mr. Peter Norbeck,
Redfield, S. D.

Dear Sir:

I regret the delay in replying to your letter of the 24th ultimo, but press of work has made it impossible to take up your questions earlier.

The following refers only to the Cheyenne River Reservation, as I am unable to give you the desired information as to Standing Rock.

Prior to the opening, the reservation was bounded as follows:- Starting at the Missouri River at a point between townships 17 and 18, thence west along this line to a point 1½ mile west of the range line between ranges 17 and 18; thence south along this line to the Cheyenne River; thence along the Cheyenne River to the Missouri River, thence along the Missouri River to the point of starting.

About 40% of the reservation remained unopened.

The boundaries of the present diminished reservation are as follows:- Starting at the Missouri River at a point between townships 15 and 16, thence west along this line to the range line between ranges 24 and 25; thence south along this line to the township line between townships 9 and 10, thence west along this line to a point 1½ mile west of the line between ranges 17 and 18; thence south along this line to the Cheyenne River; thence along the Cheyenne River to the Missouri River, thence along the Missouri River to the place of starting.

Indian population June 30, 1912, was 2591.

To date, 3146 allotments have been approved, involving approximately 1,100,000.acres.

About 90% of the Indians have been allotted.

Trusting that the above information will answer your purpose, I am,

Very respectfully,

Superintendent.

RCC

Cheyenne River Agency, S. D.,
February 13, 1913.

The Attorney General,
Pierre, S. D.

Sir:

Your opinion is requested as to the application of the State herd law on the ceded part of the Cheyenne River Reservation and, also, upon the present diminished reservation.

The Department of the Interior, under date of July 25, 1912, issued regulations governing the use of vacant ceded Indian lands. A copy of said regulations is enclosed herewith. These regulations provide for the issuance of yearly grazing permits to persons for the grazing of stock on the unentered tribal ceded lands. Several permits, in accordance with these regulations, have already been issued.

The Department of the Interior has also ruled that the Indians, who hold allotments on these ceded lands, have the right to graze on the vacant ceded lands 100 head of horses or cattle or 500 head of sheep and that homesteaders, within this territory, may graze on the vacant Indian land 40 head of horses or cattle or 200 head of sheep.

The question now arises as to the application of the State herd law on these ceded lands, as it would appear to me that the

APPENDIX C

herd law, if enforced, would conflict with the regulations of the Department of the Interior above referred to.

The following questions in connection with this matter, I submit:

1. Will Indians in this territory who take advantage of the grazing privilege allowed be compelled to herd their stock on unentered tribal lands or will it be up to the homesteader to protect his property with fences?

2. Will the homestead entryman, within this territory, be required to herd his stock on the unentered tribal lands or will it be up to the Indian allottee within this territory to fence his allotment?

3. Will the holder of a permit, as contemplated by the enclosed regulations, be subject to the homestead entryman for damages caused by his stock or employees to unfenced homestead land.

I would, also, ask your opinion as to the application of the State herd law on the present closed or diminished reservation. Part of the closed reservation is within organized counties of the State and lands therein are constantly being sold and patents in fee issued to the purchasers. Can the purchasers of land within the diminished reservation demand the protection of the State herd

(3)

law?

We are contemplating an issue of live stock to certain Indians and it is important that we know the exact status of the Nord Law.

Very respectfully,

Ww.T

Superintendent.

1346384 "K" 1917
P.S.S. 1277

THE SECRETARY OF THE INTERIOR
WASHINGTON

JUL 23 1929

James
Richards
Moore
McDowell
Newman
Patterson
Feeney
Wm Lee
Pelham

2-9
Cheyenne River

Hon. William Williamson,

House of Representatives.

My dear Mr. Williamson:

I have your letter of July 18, 1929, concerning the restoration to homestead entry of lands within the former Cheyenne River Indian Reservation in South Dakota. Your letter asks, if lands which have come back to the Government's supervision on account of default in payments by purchasers, would be restored by the Secretary if petitions were submitted signed by residents of that locality who wish to file homesteads.

Lands within the former Cheyenne River and a portion of the Standing Rock Indian Reservations were opened to homestead entry on May 2, 1910, under authority of the act of May 29, 1908 (35 Stat. 460), which provides in part:

> ***And it is further provided that any lands remaining unsold after said lands have been open to entry for seven years may be sold to the highest bidder for cash without regard to the prescribed price thereof fixed under the provisions of this Act, under such rules and regulations as the Secretary of the Interior may prescribe".

In accordance with this proviso the remaining undisposed of lands were withdrawn from entry for the purpose of sale on May 27, 1919, with five exceptions set out in letter to you from the Commissioner of the General Land Office under date of November 22, 1928. Your especial attention is called to exception No. 2 which reads as follows:

> "Lands which on May 26, 1919, were embraced in existing entries, may be reentered if such existing entries were thereafter canceled on contest, relinquishment or otherwise".

This appears to be the answer to your question so far as homestead

DEPT OF THE INTERIOR
RECEIVED
JUL [illegible] 1929
SEC'Y'S OFFICE,
[illegible]

COPY FOR SECRETARY'S OFFICE
To be always left on top.

entries are concerned. Any lands which were embraced in an entry at the date of the withdrawal for the purpose of sale may be reentered at any time after the cancellation of the entry. As no entry has been allowed for these lands since May 27, 1919, unless it came within the five exceptions, the land embraced in an entry which is canceled for nonpayment will be subject to reentry under exception No. 2 without any action by the Department.

However, where a purchase is canceled the land returns to its former status and is not subject to homestead entry, but only to sale at public auction at such time as the Department may direct such a sale to be held.

If the majority of the people in the vicinity of these lands, both white and Indian, desire the restoration to homestead entry of all the Cheyenne River and Standing Rock lands opened under the act of May 29, 1908, supra, it is believed that this can best be accomplished by an act of Congress as was done in the case of lands on the south half of the former Colville Indian Reservation in Washington. The opening act in that case provided for the withdrawal of the lands for the purpose of sale five years after the opening, or on September 4, 1921. By the acts of May 9, 1922 (42 Stat. 507), and May 17, 1926 (44 Stat. 558), the time has been extended to September 4, 1931.

Very truly yours,

(Sgd.) RAY LYMAN WILBUR

MOTION FILED
MAY 13 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6290

GLEN D. DUPRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHEYENNE RIVER SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6290

GLEN D. DUPRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42(3), the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, moves the Court for leave to file the attached brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari in the above-captioned case. The respondent United States has consented to the filing of this brief; the petitioner, Glen D. DuPris, has refused so to consent.

The Cheyenne River Sioux Tribe is a fedeally recognized Indian tribe which governs its members on a

reservation that in part has been opened to settlement by non-Indians under the Act of May 29, 1908, 35 Stat. 460. The 1908 Act was one of a series of so-called "surplus lands" statutes which were enacted by Congress at the turn of the twentieth century without the consent of the affected Indian tribes, and which opened all or parts of the tribes' reservations to non-Indian settlement. Without exception those areas previously opened to settlement by the 1908 legislation have been recognized and consistently administered by the federal government and the Tribe as part of the Cheyenne River Reservation.

This case presents a specific issue of great and continuing concern to the Cheyenne River Sioux Tribe—namely, whether the 1908 Act effected a termination of the reservation status of the western half of the Cheyenne River Reservation. If the decision of the Court of Appeals that the 1908 legislation did not disestablish any portion of the Reservation does not stand, consequences for *amicus curiae* and its members will be undeniably revolutionary. Specifically, the federal government no longer will possess exclusive jurisdiction over members of the Tribe who reside in the area of the Reservation opened to non-Indian settlement by the 1908 Act. Moreover, the Tribe's ability to exercise effectively its traditional powers of self-government will be severely curtailed.

This result inevitably will occur because, as was the case at the time the 1908 statute was enacted, much of the Tribe's cultural and political life is centered in that portion of the Reservation affected by the 1908 Act. When Congress passed the legislation, fully 55 percent of all allotments which had been made to Tribal members were located in the opened area—a Tribal presence which has remained to this day. Specifically,

over 50 percent of the present population in the Reservation portions of both Dewey and Ziebach Counties, South Dakota, which are the areas affected by the 1908 Act, is enrolled as members of the Tribe. More important, almost 80 percent of the Tribe's total membership resides in the opened portion of the Reservation.

The Cheyenne River Sioux Tribe submits the attached brief in order to assist the Court in recognizing that the Court of Appeals correctly applied the principles of construction established by this Court for interpreting surplus lands legislation such as the 1908 Act. Since these points are not likely to be covered—or to be approached in identical fashion—in the brief submitted by respondent United States, and since the Tribe's discussion thus may be helpful to the Court, the Cheyenne River Sioux Tribe requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

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600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Attorney for Amicus Curiae
Cheyenne River Sioux Tribe

Of Counsel:
KENNETH J. VANDEVELDE

May 13, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6290

GLEN D. DUPRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CHEYENNE RIVER SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA IN OPPOSITION TO THE PETITION FOR A WRIT CF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Cheyenne River Sioux Tribe is a federally recognized Indian tribe which governs its members on a reservation that in part has been opened to settlement by non-Indians under the Act of May 29, 1908, 35 Stat. 460. The 1908 Act was one of a series of so-called "surplus lands" statutes which were enacted by Congress at the turn of the twentieth century without the consent of the affected Indian tribes, and which opened all or parts of the tribes' reservations to non-Indian settlement. Without exception those areas previously opened to

settlement by the 1908 legislation have been recognized and consistently administered by the federal government and the Tribe as part of the Cheyenne River Reservation.

This case presents a specific issue of great and continuing concern to the Cheyenne River Sioux Tribe—namely, whether the 1908 Act effected a termination of the reservation status of the western half of the Cheyenne River Reservation. If the decision of the Court of Appeals that the 1908 legislation did not disestablish any portion of the Reservation does not stand, the consequences for *amicus curiae* and its members will be undeniably revolutionary. Specifically, the federal government no longer will possess exclusive jurisdiction over members of the Tribe who reside in the area of the Reservation opened to non-Indian settlement by the 1908 Act. Moreover, the Tribe's ability to exercise effectively its traditional powers of self-government will be severely curtailed.

This result inevitably will occur because, as was the case at the time the 1908 statute was enacted, much of the Tribe's cultural and political life is centered in that portion of the Reservation affected by the 1908 Act. When Congress passed the legislation, fully 55 percent of all allotments which had been made to Tribal members were located in the opened area—a Tribal presence which has remained to this day. Specifically, over 50 percent of the present population in the Reservation areas of both Dewey and Ziebach Counties, South Dakota, which are the areas affected by the 1908 Act, is enrolled as members of the Tribe. *See generally* Government Exhibit Nos. I, II. More important, almost 80 percent of the Tribe's total membership resides in the opened portion of the Reservation. *See generally* Government Exhibit Nos. I, II.

The Cheyenne River Sioux Tribe submits the following brief in order to assist the Court in recognizing that the Court of Appeals correctly applied the principles of construction established by this Court for interpreting surplus lands legislation such as the 1908 Act.[1]

STATEMENT OF THE CASE

The relevant facts, which have been set forth in greater detail in the brief filed by respondent United States, can be summarized in the following manner. On December 23, 1976, defendant, a juvenile and a member of the Cheyenne River Sioux Tribe, allegedly committed burglary and larceny in a clothing store in Eagle Butte, South Dakota. The commercial establishment in which the foregoing events occurred is on fee patent land located in that portion of the Cheyenne River Reservation, as established and defined by the Act of March 2, 1889, 25 Stat. 888, which was opened to non-Indian settlement pursuant to the Act of May 29, 1908, 35 Stat. 460.

On June 1, 1977, the United States filed in the District Court below an Information charging defendant with two violations of the Major Crimes Act, 18 U.S.C. § 1153.

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[1] The Cheyenne River Sioux Tribe is aware that in *Stankey v. Waddell*, 256 N.W.2d 117 (S.D. 1977), the South Dakota supreme court, based upon its reading of *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kreip*, 430 U.S. 584 (1977), reached a contrary decision concerning the effect of the 1908 legislation. That state court's opinion, however, obviously was rendered prior to the Eighth Circuit's consideration here of its previous ruling in *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1975). The *amicus curiae* assumes that, in light of the Eighth Circuit's decision in this case on what is clearly an issue of federal Indian law, the South Dakota supreme court, if confronted with the question again, will follow the Court of Appeal's lead. In any event, no reason exists at the present time to assume otherwise.

The United States stated in its Information that the alleged crimes took place within the boundaries of the Cheyenne River Reservation, and that they were, therefore, subject to federal jurisdiction under 18 U.S.C. § 1153.

On October 5, 1977, defendant filed a Motion to Dismiss the Information which asserted the absence of federal jurisdiction. Specifically, defendant argued that the 1908 Act had removed from the Cheyenne River Reservation those lands on which the alleged crimes took place, and thus ousted the United States of any criminal jurisdiction over defendant. On June 29, 1978, the District Court filed an Order and accompanying Memorandum Opinion granting defendant's Motion to Dismiss the Information.

The United States filed a timely Notice of Appeal on July 28, 1978. Following argument the appeal was submitted on December 11, 1978. The Court of Appeals rendered a decision on November 27, 1979, which reversed the judgment of the District Court and reaffirmed the Eighth Circuit's earlier holding in *United States ex rel. Condon v. Erickson,* 478 F.2d 684 (8th Cir. 1973), that the Act of May 29, 1908, did not terminate the reservation status of any portion of the Cheyenne River Reservation. On December 21, 1979, defendant DuPris filed a Petition for Rehearing with Suggestion that Rehearing be *En Banc,* which Petition was dismissed by the Court of Appeals with prejudice on January 18, 1980.

The defendant DuPris filed in the Supreme Court on February 19, 1980, a motion for an extension of time in which to file a Petition for a Writ of Certiorari to review the decision of the Court of Appeals. The Court granted defendant's motion by order dated February 21,

1980, without prejudice to the question whether DuPris' application was made in timely fashion. The defendant filed his Petition for a Writ of Certiorari with the Court on March 20, 1980.

REASONS FOR NOT GRANTING THE WRIT

A. The United States Attorney for the State of South Dakota has moved in the District Court to Dismiss the Information against petitioner DuPris, and the petition for a writ of certiorari, therefore, should be denied.

In the period immediately preceding the filing of this brief, *amicus curiae* learned that the United States Attorney for the State of South Dakota apparently has filed in the District Court a motion to dismiss with prejudice the information against petitioner DuPris. While the Cheyenne River Sioux Tribe is not privy to the specific reasons for dismissal, it assumes that the details of this recent development will be discussed in the brief submitted by the United States.

Should the Information be dismissed with prejudice, a denial of the petition for a writ of certiorari would be appropriate. The Supreme Court consistently has adhered to a general policy which eschews reviewing cases where the threat to a petitioner is hypothetical and not real. *Cf. Ellis v. Dyson,* 421 U.S. 426 (1975); *Linda R.S. v. Richard D.,* 410 U.S. 614 (1973); *Younger v. Harris,* 401 U.S. 37 (1971); *Golden v. Zwickler,* 394 U.S. 103 (1969); *Bailey v. Patterson,* 369 U.S. 31 (1962); *see generally Poe v. Ullman,* 367 U.S. 497 (1961).

B. This case is not appropriate for review by the Supreme Court because it does not raise questions concerning what fundamental standards are to be applied to determine the jurisdictional effect of Indian surplus lands legislation, or whether those criteria which have been developed by the Supreme Court over the past two decades were utilized by the Court of Appeals below.

The Supreme Court is no stranger to cases which raise an issue of disestablishment as it relates to federal statutes enacted in the early twentieth century which opened all or portions of Indian reservations to non-Indian settlement. Specifically, during the past twenty years the Court has considered four such cases—three of which have been reviewed within the past ten years. *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Mattz v. Arnett,* 412 U.S. 481 (1973); *Seymour v. Superintendent,* 368 U.S. 351 (1962). These decisions set forth very clearly the legal standards which are to be applied in addressing a disestablishment question.

In its *Seymour* and *Mattz* opinions, the Supreme Court emphasized, as it had held previously in *United States v. Celestine,* 215 U.S. 278 (1909), that "'when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.'" *Mattz v. Arnett,* 412 U.S. at 504-05; *Seymour v. Superintendent,* 368 U.S. at 359. The Court also stated that, to effect the disestablishment of reservation lands, a "congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett,* 412

U.S. at 505. Moreover, the fact that Congress chose to open Indian lands to non-Indian settlement does not mean in itself that a reduction of reservation boundaries was intended. *Id.* at 496-97. Finally, as a backdrop for its *Seymour* and *Mattz* opinions, the Court relied upon the established principle of Indian law that ambiguities arising in statutes affecting Indian tribes should be resolved in their favor. *Seymour v. Superintendent,* 368 U.S. at 356 n.12.

In *DeCoteau v. District County Court,* 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), the Supreme Court utilized precisely the same principles which had served as the basis for its *Seymour* and *Mattz* decisions:

> This Court does not lightly conclude that an Indian Reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." [Citation omitted.] The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation.'" [Citations omitted.] Accordingly, the Court requires that the "congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." [Citations omitted.] In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit. [Citation omitted.]

DeCoteau v. District County Court, 420 U.S. at 444. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 586-87.

Based upon significantly varying facts, the Supreme Court reached different results in applying the relevant legal rules in the foregoing cases. Thus, in its *DeCoteau* and *Rosebud* decisions, the Court held that the federal statutes at issue had terminated the reservation status of affected areas, while in the *Seymour* and *Mattz* cases an opposite conclusion was reached.

As the Court well knows, the Eighth Circuit also is not a stranger to the disestablishment issue, and, based upon the standards which have been established and reaffirmed over the years by the Supreme Court, that Court of Appeals has analyzed the surplus lands legislation relating to a number of Indian tribes within its Circuit and has reached different legal results in light of varying factual patterns. *Compare United States v. Long Elk*, 565 F.2d 1032 (8th Cir. 1977); *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), *with United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975); *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8th Cir. 1975). This Court is aware, of course, that in the *Rosebud Sioux Tribe* case the Eighth Circuit concluded, just as the Supreme Court later did, that the 1904, 1907, and 1910 Acts at issue there did terminate the reservation status of affected Indian lands. Moreover, as its opinion in *United States v. Long Elk*, 565 F.2d 1032 (8th Cir. 1977), indicates, the Eighth Circuit has applied the analysis reaffirmed in the *DeCoteau* and *Rosebud Sioux Tribe* cases in a conscientious, scholarly, and detailed fashion to the disestablishment questions coming before it.

No basis exists for believing that the Eighth Circuit did anything other than the foregoing in considering

petitioner DuPris' case below. Here the Court of Appeals was required to consider again its prior decision in *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1973), that the 1908 Act did not disestablish any portion of the Cheyenne River Reservation—a judgment, significantly, which already had been cited favorably by this Court in its *Mattz* opinion. *See Mattz v. Arnett*, 412 U.S. at 505 n.23. After reviewing the question in light of the Supreme Court's numerous decisions on the general subject, including the *Rosebud Sioux Tribe* opinion (*United States v. DuPris*, 612 F.2d 319, 321-23 (8th Cir. 1979)), the Court of Appeals concluded that nothing in the 1908 Act or its legislative history evinced a clear intent on the part of Congress to terminate the reservation status of Indian lands affected by that legislation.

The *amicus curiae* Cheyenne River Sioux Tribe believes that the result below is fully consistent with the Tribe's current presence in the opened portion of the Reservation. The Tribe still represents a majority of the total population in that area, and a vast majority of its members reside there. Furthermore, the Tribe's economy is centered in the opened portion of the Reservation, and, of both symbolic and actual significance, its seat of government is located there.

In light of the foregoing, Supreme Court review of the petitioner's case seems an unjustified expenditure of this Court's resources. The Supreme Court has established the guidelines for disestablishment cases, which historically the Eighth Circuit has applied with diligence. In applying those standards to the present case, the Court of Appeals concluded, as it first did nearly a decade ago, that the lands opened by the 1908 Act remain a part of the Cheyenne River Reservation—a result which

comports fully with the extent of Tribal life in that area in 1980.

C. The Court of Appeals' decision below is correct because, under the rules of interpretation established by this Court, neither the 1908 Act nor its legislative history contain clear indicia that Congress intended disestablishment.

Apart from the more general question whether Supreme Court review of petitioner's case is justified in light of this Court's and the Eighth Circuit's historically extensive and consistent treatment of the legal guidelines relating to disestablishment, a brief review of the 1908 Act and its legislative history indicates that the Court of Appeals' decision below was demonstrably correct. In short, the foregoing materials do not contain the clear indicia of disestablishment which the Supreme Court found in the *DeCoteau* and *Rosebud Sioux Tribe* cases.

1. *The face of the 1908 Act does not reflect an explicit Congressional intent to effect the disestablishment of any portion of the Cheyenne River Reservation.*

An analysis of the face of the 1908 Act belies petitioner's argument that the legislation reflects an explicit intent on the part of Congress to reduce the boundaries of the Cheyenne River Reservation:

a. No "agreement," bilateral or otherwise, serves as the backdrop for the 1908 Act. In both the *DeCoteau* and *Rosebud Sioux Tribe* cases this "unmistakable base line premise of disestablishment" (*Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 592) did exist, and the Court attached great significance to it. *Rosebud Sioux Tribe*

v. Kneip, 430 U.S. at 592; *DeCoteau v. District County Court*, 420 U.S. at 445.

b. Section 1 of the 1908 Act provided only that a specified portion of the Cheyenne River and Standing Rock Reservations shall be "opened."[2] 35 Stat. at 460. The foregoing language contrasts starkly to the parallel explicit provisions of cession contained in the 1901 Agreement and the 1904 Act construed by the Supreme Court in the *Rosebud Sioux Tribe* case. Indeed, the word "cede" does not appear once in the entirety of the 1908 legislation. *Compare United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975).[3]

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[2]The 1907 and 1910 Acts construed in the *Rosebud Sioux Tribe* case also contained this operative language, but there the Court interpreted the foregoing statutes by reference to the 1901 Agreement and the 1904 legislation—both of which, as explained below, contained explicit cession language:

> Having determined that the 1904 Act carried forth the intent to disestablish which was unquestionably manifested in the 1901 Agreement, our examination of the 1907 and 1910 Acts is made easier.
>
> * * *
>
> *The 1907 and 1910 Acts must be considered in context, and an important part of that context is the 1901 Agreement and the 1904 Act.* [Emphasis added.]

Rosebud Sioux Tribe v. Kneip, 430 U.S. at 606 n.30. Furthermore, section 1 of the 1910 Act makes explicit reference to the "tract to be ceded". Act of May 30, 1910, 36 Stat. 448. *Cf. United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975).

[3]The presidential proclamation implementing the 1908 Act also is free from any language of cession. *See* Proclamation of August 19, 1909, 35 Stat. 2500. The foregoing stands in sharp contrast to the proclamation issued on the heels of the 1904 legislation construed in the *Rosebud Sioux Tribe* case. The latter proclamation contained language of cession and amounted, in this Court's view, to an "unambiguous, contemporaneous statement,

[footnote continued]

c. Section 1 of the 1908 statute also authorized the Secretary of the Interior to reserve lands in the opened area for agency, school, and religious purposes. 35 Stat. at 461. This language would seem incongruous if the statute removed all surrounding areas from reservation status and restored them to the public domain. Significantly, the 1904 and 1907 statutes construed in the *Rosebud Sioux Tribe* case did not contain the foregoing provision.

d. Section 2 of the 1908 Act contained a provision which reserved to the Tribe all lands in the opened area which were found to have mineral value. 35 Stat. at 462. That Congress would have reserved minerals to the Tribe in the first instance and then proceeded to terminate that same portion of the reservation by opening a small quantity of surplus land to non-Indian settlement seems highly improbable. Significantly, the aforementioned provision was absent from the legislation construed in the *DeCoteau* and *Rosebud Sioux Tribe* cases, but has been present in other surplus lands legislation which has been interpreted by courts not to effect disestablishment. *See, e.g., City of New Town v. United States,* 454 F:2d 121 (8th Cir. 1972) (Act of June 1, 1910, 36 Stat. 455).

Furthermore, even those provisions in the 1908 Act which are relied upon by petitioner and the *amici curiae* supporting him do not show persuasively that Congress intended a reduction of reservation boundaries:

a. The reference in section 2 of the legislation to the "diminished" portion of the reservation is ambiguous, as the Court of Appeals below emphasized the first time it considered the 1908 Act. *See United States ex rel.*

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by the Nation's Chief Executive, of a perceived disestablishment of Gregory County." *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 602-03.

Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). Although the reference could be interpreted to mean disestablishment, the term also may have meant "diminished" only in the sense that lands within the exterior boundaries of the reservation were being opened to purchase by outsiders.

b. Section 1 of the 1908 Act does contain a provision reserving specified sections of land for state school purposes, which the Supreme Court construed in its *Rosebud Sioux Tribe* opinion to be a factor in support of a finding of disestablishment. In light, however, of the provision—discussed above—in the same section which authorizes the Secretary of the Interior to set aside lands in the opened portion of the Reservation for purely *Tribal* educational purposes, the state school lands provision does not have nearly the same force here that it did in the *Rosebud Sioux Tribe* decision. Furthermore, the Supreme Court indicated in its *DeCoteau* decision that, among the various statutory indicia of disestablishment, the state school lands provision which appeared frequently in surplus lands legislation is not especially persuasive one way or the other. *DeCoteau v. District County Court,* 420 U.S. at 445 n.33.

c. Finally, the provision prohibiting the sale of liquor which was added to the 1908 legislation by the Act of February 17, 1910, 36 Stat. 196, does not represent convincing evidence that Congress intended to terminate the reservation status of lands opened in 1908. To the extent such a provision was unnecessary with respect to areas already in reservation status, Congress' failure to include the provision in the original 1908 Act is implicit evidence that disestablishment was not intended.

Furthermore, a report on other legislation proposed in 1910 which related to the Cheyenne River Reservation, and which contained a liquor provision identical to the foregoing, indicates that such a provision was sought by *Tribal members* with respect to the *entire* reservation rather than merely the opened portion. *See* S. Rept. No. 518, 61st Cong., 2d Sess. 4 (1910) (Letter of April 5, 1910 from Secretary of the Interior to Chairman of the Senate Committee on Indian Affairs). The report reflects confusion on the part of the Secretary of the Interior about the state of federal liquor laws in reservation areas, but it does little to advance the inquiry about whether the Congress considered opened portions of the Reservation to be disestablished.

2. *The legislative history of the 1908 Act does not evince a clear Congressional intent to disestablish any portion of the Cheyenne River Reservation.*

Beyond the language which appears on the face of the 1908 Act, the legislative history also is unpersuasive that Congress intended disestablishment. As the discussion below will show, the foregoing materials do not satisfy this Court's requirement that a "congressional determination to terminate must . . . be clear from the . . . legislative history" (*Mattz v. Arnett*, 412 U.S. at 505):

a. The limited Congressional debate on the 1908 legislation, which took place only in the House of Representatives, contains no explicit or implicit support for a finding of disestablishment. The terms "cede" or "cesssion," or, for that matter, any of the other words courts have found in various contexts to be indicative of disestablishment, such as "reduce," "relinquish," or "diminish," appear nowhere in the debate.

b. The Congressional reports on the legislation which became the 1908 Act also lack conspicuously any compelling evidence that disestablishment was intended. *See generally* S. Rept. No. 439, 60th Cong., 1st Sess. (1908); H.R. Rept. No. 1539, 60th Cong., 1st Sess. (1908). The references to merely "opening" the Indian lands subject to the legislation are many (*see* Rept. No. 439, 60th Cong., 1st Sess. 4 (1908); H.R. Rept. No. 1539, 60th Cong., 1st Sess. 2 (1908)), but nowhere in the Committee narratives do the words "cede" or "cession" appear even once. The absence of such terms here contrasts sharply to the abundance of such references in parallel Congressional materials relating to the statutes construed in the *Rosebud Sioux Tribe* case. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 595.[4]

3. *The subsequent jurisdictional treatment of those portions of the Cheyenne River Reservation which were opened by the 1908 Act provides no persuasive evidence that Congress intended the disestablishment of affected Tribal lands.*

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[4] In support of their position petitioner and *amici curiae* supporting him do make reference to the phrase "reservations as diminished" which appears in the Senate report on the bill which became the 1908 Act. *See* S. Rept. No. 439, 60th Cong., 1st Sess. 4 (1908). This term, of course, is subject to the ambiguity pointed out above and explained in the Eighth Circuit's decision in *United States ex rel. Condon v. Erickson*. *See* text *supra*, at 16-17. Moreover, read in *pari materia* with the preceding four sentences, the report language relied upon by petitioner clearly is susceptible to the inference that the Senate merely was making reference to that portion of the Reservation which was to be left in an *unopened* state rather than to the lands which were to remain in reservation status.

In their brief in support of petitioner, the *amici curiae* concede that "the delineation of jurisdiction during the early years immediately following the opening of the area in 1909 is somewhat unclear." Brief for the State of South Dakota, *et al.*, at 13. The foregoing concession is well-advised since the instances, subsequent to the 1908 Act, in which the Congress and various federal administrative agencies treated the opened area as a continuing part of the Reservation are legion.[5]

Furthermore, *amicus curiae* Cheyenne River Sioux Tribe takes explicit and categorical exception to the assertions of *amici curiae* supporting petitioner that the State of South Dakota exercised unchallenged jurisdiction over the non-trust portions of the opened area of the Reservation between the years 1910 and 1973. The only conceivable support for the foregoing statement in the record is the obviously self-serving testimony offered in the District Court below by the State's Attorney for Dewey County. Despite the District Court's apparent receptivity to the testimony of the State's Attorney, the Court denied the United States the opportunity to adduce evidence on the same question.

CONCLUSION

After the final sentence of the legislative materials relating to the 1908 Act has been analyzed, this case plainly and simply is not *DeCoteau v. District County Court* or *Rosebud Sioux Tribe v. Kneip*. In contrast to the statutes construed in both the foregoing decisions,

[5] *See, e.g.*, Act of August 11, 1964, Pub. L. No. 88-418, 78 Stat. 389; Act of September 30, 1950, 64 Stat. 1094; Act of March 4, 1921, 41 Stat. 1446; Act of May 28, 1914, 38 Stat. 383; Act of June 23, 1910, 36 Stat. 602; 40 I.D. 56 (1910); 38 I.D. 160 (1909).

here Congress nowhere utilized explicit and unmistakable language of cession. The legislative record does not bespeak disestablishment with anything approaching the clarity which the Supreme Court found in the *DeCoteau* and *Rosebud Sioux Tribe* cases. Indeed, on balance the Congressional materials support only the proposition that Congress wished to "open" a portion of the Cheyenne River Reservation, which this Court repeatedly has emphasized is completely consistent with continued reservation status.

Furthermore, the Cheyenne River Sioux have an entirely legitimate expectation that their reservation located in Dewey and Ziebach Counties will continue to be honored and respected, as it has been generally for the more than seventy years since 1908. The population in the opened portion of the Reservation is still predominantly Indian, and, more important, the vast majority of members of the Tribe reside there. The Tribe and its individual members still have substantial land holdings in the 1908 area—just as they did at the time those lands were opened.

For all the aforementioned reasons, the *amicus curiae* Cheyenne River Sioux Tribe believes the judgment of the Court of Appeals below is entirely consonant with the prior decisions of the Supreme Court, and, accordingly, the Tribe respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-6290

GLEN D. DUPRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Certain other interested States did not have an opportunity to fully examine the merits of the question presented prior to the printing of this Brief. The Office of the Clerk will be advised directly if those States elect to join in the views expressed herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-6290

GLEN D. DUPRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE STATE OF SOUTH DAKOTA, *ET AL.*, AS AMICI CURIAE IN SUPPORT OF PETITION

INTEREST OF AMICI CURIAE

The State of South Dakota and the States and Counties joining herein have a general interest in the manner in which any question of federal Indian law is resolved. With respect to the instant case, the issue of reservation status is of particular importance to those states containing historic reservation areas, such as certain

Amici States here, since the resolution of this issue can significantly affect the extent to which the States and their subdivisions may exercise jurisdiction within those areas. Thus, the principles and guidelines used by the courts in resolving the question of reservation status are of paramount concern to the States joining in this brief.

In addition, the States of South Dakota and North Dakota and the four Amici Counties have a special interest in the outcome of the instant case, because on that outcome depends the extent to which these States and their political subdivisions may exercise jurisdiction over the particular area affected by the Act of Congress in question.[1] If the opinion of the Court of Appeals is left to stand, its holding that the area in question remains within the reservation boundaries will divest them of much of their civil, criminal, administrative, and regulatory jurisdiction within that area. *See, e.g., DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); *McClanahan* v. *Arizona State Tax Commission*, 412 U.S. 164 (1973).

In spite of the recent holdings of this Court in *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the court below has refused to depart from its earlier decision in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973). On the other hand, the South Dakota Supreme Court has recognized the importance of the intervening decisions of this Court and has come to a

[1] The 1908 Act in dispute opened portions of both the Cheyenne River Reservation in South Dakota, and the Standing Rock Reservation in South Dakota and North Dakota. Dewey and Ziebach Counties lie within the original boundaries of the Cheyenne River Reservation; Corson and Sioux Counties lie within the original boundaries of the Standing Rock Reservation.

conclusion opposite to that of the court below. *Stankey* v. *Waddell*, 88 S.D. 104, 256 N.W.2d 117 (1977). Thus, as in *DeCoteau, supra* at 430-31, there exists a conflict between the State Supreme Court and the Court of Appeals which requires resolution by this Court.

Because the decision below, if allowed to stand, will seriously undermine the principles applicable to such questions as expressed by this Court in its previous decisions, the Amici States and Counties submit this brief in support of the petition for certiorari.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case set forth in the Petition for Writ of Certiorari.

ARGUMENT

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS WAS REACHED WITHOUT THE DETAILED ANALYSIS MANDATED BY THIS COURT.

In two relatively recent cases, this Court has outlined the proper judicial approach to questions of the disestablishment or diminution of historic Indian reservations by acts of Congress. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). As specified by this Court, the requisite analysis involves an examination of several factors: the face of the Act at issue, its legislative history and surrounding circumstances, and the subsequent jurisdictional history. *Rosebud, supra* at 587, 603; *DeCoteau, supra* at 442, 444. Following the mandate of those

decisions, the District Court in the instant case undertook an exhaustive review of the materials relevant to each of the above factors and, in a thirty-page opinion, ruled that the 1908 Cheyenne River Act was intended by Congress to disestablish the portion of the reservation opened by the Act. *United States* v. *A Juvenile*, 453 F. Supp. 1171 (D.S.D. 1978), *rev'd sub nom. United States* v. *Dupris*, 614 F.2d 319 (8th Cir. 1979).[2] Judge McMillian of the Court of Appeals panel below arrived at the same conclusion following a thorough examination of the same material. *United States* v. *Dupris*, 612 F.2d 319, 323-41 (8th Cir. 1979) (McMillian J., dissenting). In addition, the same result was reached by the South Dakota Supreme Court in 1977 in its well-reasoned opinion in *Stankey* v. *Waddell*, 88 S.D. 104, 256 N.W.2d 117 (1977).

Nevertheless, two members of the court panel below declined to engage in the comprehensive analysis required by *Rosebud* and *DeCoteau* and instead relied on the Eighth Circuit's earlier decision in *United States ex rel. Condon* v. *Erickson*, 478 F.2d 684 (8th Cir. 1973). *United States* v. *Dupris*, 612 F.2d 319, 320 (8th Cir. 1979). *Condon* preceded both *DeCoteau* and *Rosebud*, and, as explained by the District Court, at the time it was decided,

> the breadth of inquiry allowed by *DeCoteau* and *Rosebud* was not recognized as the applicable guide to statutory construction in a case of this type. Traditional and more limited methods of statutory construction were at that time relied upon. Operating within such a limited framework, the wealth of

[2] The case was decided by Judge Andrew W. Bogue, who also decided the Rosebud case at the District Court level. *See Rosebud Sioux Tribe* v. *Kneip*, 375 F. Supp. 1065 (D.S.D. 1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977).

> materials available here could not be considered. [*Condon*] is therefore not viable.

453 F. Supp. at 1201. *See also Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 173 n.11 (1977).

While the majority opinion of the Court of Appeals refers to some of the arguments suggested by the material available to the Court, it does so in a summary fashion and only in response to Judge McMillian's dissent. 612 F.2d at 320-23. The failure of the Court of Appeals to engage in the comprehensive analysis required by the decisions of this Court undermines the continuing force of those decisions and necessitates review of the decision below.

II. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS DISREGARDS CLEAR INDICATIONS OF LEGISLATIVE INTENT AND IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

This Court has stated that in determining questions such as the one presented here, "[t]he underlying premise is that congressional intent will control." *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977). Despite this clear statement, the Court of Appeals ignored the manifest intent of Congress to disestablish the portion of the original Cheyenne River Reservation opened by the Act of May 29, 1908, 35 Stat. 460. In so doing, the court below not only failed to heed the general mandate of this Court, but implicitly rejected the specific holdings of this Court in *Rosebud* and in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975).

As stated in the Petition for Writ of Certiorari, a congressional intent to diminish the boundaries of the

Cheyenne River Reservation is plainly evident from the face of the 1908 Act. Section 2 of the Act refers to the area unaffected by the Act as "the reservation thus diminished", and Section 9 refers to portions of the opened land as "part of the public domain". §§ 2, 9, Act of May 29, 1908, 35 Stat. 460, 461, 464 (emphasis added). These expressions are unambiguous and can be interpreted only as indications of an underlying purpose to disestablish the affected portion of the original Reservation. *See Rosebud, supra* at 589 n.5 ("public domain"), 613-14 ("diminished"); *DeCoteau, supra* at 446 ("public domain"); *Seymour* v. *Superintendent,* 368 U.S. 351, 354 (1962) ("public domain", "diminished"); *United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120, 122 (8th Cir. 1975), *cert. denied,* 430 U.S. 982 (1977) ("diminished").

The operative language of the 1908 Cheyenne River Act authorized the Secretary of the Interior to "sell and dispose of" the land described. § 1, 35 Stat. 460. While this language alone is not determinative, *see Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584, 586-87 (1977), it is certainly consistent with disestablishment, for this same wording appeared in the 1907 and 1910 Rosebud Acts which were found by this Court to have disestablishment effect. *Rosebud, supra* at 605-15. *See also United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120 (8th Cir. 1975). Although the 1910 Rosebud Act, unlike the Act here in issue, also referred to the area opened by the Act, as "the tract ceded", § 1, 36 Stat. 448 (1910), this wording does not appear in the 1907 Rosebud Act which was unequivocally held by this Court in *Rosebud* to have the effect of disestablishment. While it is true that the presence of cession language in a statute is reflective of an intent to disestablish, it does not follow that the absence of such language is relevant, since it is not apparent that Congress

afforded the words any special weight in defining its intent. As this Court has made clear, the absence of words of cession in the 1907 Rosebud Act did not signify an intent different from that of a 1904 Act which did contain such language. *Rosebud, supra* at 608-09.

In addition, as explained in the Petition, Section 7 of the 1908 Act contains the same provision relating to school lands as is found in all three Rosebud Acts and which was fully explicated by this Court in *Rosebud, supra* at 599-601, 608 n.36. Rather than even acknowledge this Court's interpretation, the court below chose instead to rely on its holding in *United States* v. *Long Elk,* 565 F.2d 1032 (8th Cir. 1977). However, the legislative history pertaining to this provision indicates that it was included for precisely the same reasons as those discussed in *Rosebud* and, as in *Rosebud,* supports a conclusion of disestablishment.[3] *See* H.R. Rep. No. 1539, 60th Cong., 1st Sess. at 2 (1908); 42 Cong. Rec. 7005 (1908).

Of additional importance is the provision added to the 1908 Act which prohibited the introduction of liquor into the opened area for a period of 25 years. § 8, Act of February 17, 1910, 36 Stat. 196. This provision is identical to the provision of the same year fully considered by this Court in *Rosebud, supra* at 613 & n.47. The 1910 Rosebud provision was found to be of particular importance in that case, since it would have been completely superfluous if the area opened by that Act had remained "Indian country". The fact that the provision in the present case was added by way of amendment makes this interpretation particularly apposite, since it is improbable that Congress went to such trouble to achieve a wholly

[3] As the District Court concluded, "There is no meaningful distinction that can be made between section 7 of this Act and the comparable sections construed in *Rosebud*. . . ." 453 F. Supp. at 1195.

redundant result. However, the court below, again without addressing the holding of *Rosebud,* found this argument to be of very little weight on the grounds that the Indians requested the amendment. 612 F.2d at 322. The logic of this distinction is not readily apparent, since the fact remains that the amendment would have been superfluous in an existing reservation, regardless of who favored the proposal.[4]

[4] The legislative material from which the court's conclusion is derived does not directly relate to the amendment in question, but is instead a report of a different bill which was aimed at the opening of that portion of the original Cheyenne River Reservation left unopened by the 1908 Act. *See* S. Rep. No. 518, 61st Cong., 2d Sess. at 4-5 (1910).

The liquor provision added to the 1908 Act was introduced on the Senate floor by Senator Gamble, the sponsor of the 1908 Act, in the form of an addition to a bill amending the 1908 Act in other respects. 45 Cong. Rec. 1647 (1910). Although the provision was passed by the Senate without debate, the discussion on the House floor makes it clear that the amendment was not thought to be superfluous. *See* 45 Cong. Rec. 1769-70 (1910). This conclusion is reinforced by a letter on the subject from the Secretary of the Interior to the Speaker of the House, which states in part:

> The Supreme Court of the United States in Dick *v.* The United States . . . sustained a provision similar to that contained in the proposed bill prohibiting the introduction of intoxicating liquors upon lands ceded by Indians for a period of twenty-five years.
>
> The department can not too strongly urge the necessity for legislation of this kind to enable it to suppress the liquor traffic with the Indians.

H.R. Doc. No. 711, 61st Cong., 2d Sess. at 1 (1910). As noted by this Court in *Rosebud* at 613 n.47, the *Dick* decision referred to in the above passage validated the statutory extension of the Indian country liquor prohibitions into non-reservation areas. *See Dick* v. *United States,* 208 U.S. 340 (1908).

From the foregoing, it is clear that a congressional intent to disestablish the opened portion of the original Cheyenne River Reservation appears on the face of the 1908 Act, despite the Court of Appeals' unsubstantiated assertion to the contrary. *See* 612 F.2d at 321.

The legislative history of the 1908 Cheyenne River Act confirms that its underlying purpose was disestablishment of the affected area. As stated in the Senate Report of the legislation,

> [t]he lands reserved for the use of the Indians upon both *reservations as diminished,* in the opinion of your committee and of the Department, are ample and more than sufficient for the present and future needs of the Indians of the respective tribes.

S. Rep. No. 439, 60th Cong., 1st Sess. at 4 (1908) (emphasis added). *See also* H.R. Rep. No. 1539, 60th Cong., 1st Sess. at 3 (1908).

Even more explicit is the report of James McLaughlin, the Indian Inspector sent to negotiate with the Tribes concerning the land to be opened under the proposed legislation. The significance of this report was that it was expressly adopted by both House and Senate Committees as a supplemental report and is therefore reflective of the Committees' views and understanding of the legislation. *See* S. Rep. No. 349, pt. 2, 60th Cong., 1st Sess. at 1-4 (1908); H.R. Rep. No. 1539, 60th Cong., 1st Sess. at 5-8 (1908). McLaughlin's report contains multiple references to new boundary lines and the cession and relinquishment of the lands to be opened,[5] and leaves no doubt as to the commonly understood effect of the Act.

[5] For example, the report contains the following passages:

> I deemed it best to submit a definite proposition as to the tract I thought the Indians should *relinquish.* . . .

(footnote continues)

Also included in the Senate and House reports with Inspector McLaughlin's report is a transcript of the proceedings of McLaughlin's councils with the Indians. S.Rep. No. 439, pt. 2, *supra* at 4-24; H.R. Rep. No. 1539, *supra* at 8-28. These materials leave no doubt as to the contemplated effect of the 1908 Act. Throughout these proceedings, both McLaughlin and the Indians spoke of the cession and relinquishment of lands and the location of new boundaries.

The court below dismissed these materials apparently on the grounds that they do not unambiguously demonstrate that an agreement was reached with the Indians. 612 F.2d at 322. This reasoning is curious, since the significance of an agreement is not that its existence is essential, but rather that if an agreement does exist, its contents may be indicative of congressional intent. As noted above, the intent of Congress is controlling; moreover, Congress has the power to unilaterally alter reservation boundaries without the consent of the tribe. *Rosebud,*

(footnote continued)

> In order that the Indians might fully understand the boundaries of the proposed *diminished reservation* I indicated with a blue pencil on a map of South Dakota the area which I believed would be to the best interests of the Indians to *relinquish*. . . .
>
> . . . .
>
> The opening of the tracts . . . would segregate the Standing Rock and Cheyenne River reservations by opening a strip 18 miles in width between them, and give to each of said agencies legal subdivision outboundaries and *compact diminished reservations*. . . .
>
> . . . .
>
> . . . [T]he Indians realized it would be advisable for them to consent to the opening of a portion of their surplus lands with the hope of thereby *securing a diminished reservation.*

S.Rep. No. 439, pt. 2, 60th Cong., 1st Sess. at 1-3 (1908); H.R.Rep. No. 1539, 60th Cong., 1st Sess. at 5-7 (1908) (emphasis added).

supra at 587, 598; *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). In the case of the Act at hand, Congress was clearly aware that it was acting pursuant to this power. *See* S. Rep. No. 439, *supra* at 4, H.R. Rep. No. 1539, *supra* at 3. *See also Rosebud, supra* at 588, 594, 598 & n.19.

An examination of the historical circumstances surrounding the enactment of the 1908 Cheyenne River Act allows only one conclusion; that is, that Congress was acting under the same basic assumption that prevailed during the passage of a series of contemporaneous and substantially identical acts opening surplus lands in South Dakota. *See* Act of April 23, 1904, 33 Stat. 254 (Rosebud Reservation); Act of April 21, 1906, 34 Stat. 124 (Lower Brule Reservation); Act of March 2, 1907, 34 Stat. 1230 (Rosebud Reservation); Act of May 27, 1910, 36 Stat. 440 (Rosebud Reservation); Act of May 30, 1910, 36 Stat. 448 (Pine Ridge Reservation). These statutes, along with the statute here at issue, were enactments of the prevailing federal policy which favored the reduction of the size of the Indian reservations and the opening of the surplus lands to non-Indian settlement. *See, e.g., Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87, 102 (8th Cir. 1975), *aff'd,* 430 U.S. 584 (1977); *United States* v. *Dupris,* 612 F.2d at 326-30 (McMillian, J., dissenting); [1906] Comm. Indian Affairs Ann. Rep. 80-81.[6] The three Rosebud statutes were

[6] The report states in part as follows:

> I am convinced that a wise provision in any general allotment act would be to allow not less than 5 or more than 40 acres of irrigable land, or not more than 640 acres of grazing land, to each Indian, in the discretion of the Secretary of the Interior. This would better most existing conditions and enable the Department to care properly for the interests of all concerned. Another result which could hardly help flowing from it would be the *more rapid opening of reservations and the consequent dissolution of the generally condemned reservation system.* . . .

[1906] Comm. Indian Affairs Ann. Rep. 81 (emphasis added).

all found by the Court to have the underlying purpose of disestablishing the opened lands, *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977), and the Pine Ridge Act was found to have the same effect in *United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120 (8th Cir. 1975), *cert. denied,* 430 U.S. 982 (1977).

A comparison of the language and legislative history of the 1908 Cheyenne River Act with that of the 1907 and 1910 Rosebud Acts and the 1910 Pine Ridge Act reveals that the statutes cannot be distinguished on any significant grounds. This close similarity is a strong indication of an identity of purpose among these Acts. *Cf. Rosebud, supra* at 608-09, 612-13 (similarities between various Rosebud Acts); *DeCoteau* v. *District County Court,* 420 U.S. 425, 446 (1975) (similarities between contemporaneously ratified cession agreements); *Cook, supra* at 123 (similarities between Pine Ridge Act and Rosebud Act). In addition, the Rosebud and Pine Ridge Acts are part of the historical context of the passage of the Cheyenne River Act, and are therefore highly relevant to the question of congressional intent. *See Rosebud, supra* at 606 n.30.

In light of the foregoing, the only reasonable conclusion is that Congress, in passing each of these surplus land acts, acted under the same understanding of the purpose and effect of the acts. In the absence of any evidence to the contrary, it is inconceivable that Congress would enact several virtually identical statutes during the same time period and concerning the same general subject matter and intend them to have profoundly different results. There is not one indication in the legislative history that Congress intended that the 1908 Cheyenne River Act have the opposite effect of the other South Dakota surplus land statutes and leave the status of the affected area

unchanged. The lack of extensive congressional debate[7] does not create doubt as to the effect of the Act but is instead a clear indication that Congress meant nothing different here than it had in other similar acts and was operating under the commonly understood assumption that lands opened to settlement would no longer be a part of the reservation.[8] *See United States* v. *A Juvenile,* 453 F. Supp. at 1187.

A final consideration in the determination of the issue at hand is the subsequent jurisdictional history of the area opened by the 1908 Act. Here, as in *Rosebud,* the delineation of jurisdiction during the early years immediately following the opening of the area in 1909[9] is somewhat unclear. Nevertheless, the available evidence indicates that the State of South Dakota consistently exercised jurisdiction over non-Indian land in the opened area for several decades until the decision in *United States ex rel. Condon* v. *Erickson,* 478 F.2d 684 (8th Cir. 1973).[10] *See*

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[7] In this regard, the legislative history of the 1908 Cheyenne River Act is comparable to that of the 1907 and 1910 Rosebud Acts and the 1910 Pine Ridge Act.

[8] This assumption is illustrated by the following statement of Senator Gamble, the Senate sponsor of all these surplus land acts, with respect to the Pine Ridge legislation:

> I may say . . ., referring to the enabling act providing for the admission of North and South Dakota, Montana, and Washington, that sections 16 and 36 in each township were granted to the separate States . . . for the benefit of the common schools; but in the States where there were Indian reservations, it provided that the grant should not take effect until the lands were *open to settlement, or, in other words, became a part of public domain. By the passage of the bill in question the lands so opened become a part of the public domain and open to settlement. . . .*

45 Cong. Rec. 1502 (1910) (emphasis added).

[9] *See* Presidential Proclamation of August 19, 1909, 36 Stat. 2500.

[10] The *Condon* case arose out of a state prosecution. *See United States ex rel. Condon* v. *Erickson,* 478 F.2d at 685.

United States v. *A Juvenile,* 453 F. Supp. at 1199. *See generally United States* v. *LaPlant,* 200 F. 92 (D.S.D. 1911); *State* v. *Barnes,* 81 S.D. 511, 137 N.W.2d 683 (1965); *Lafferty* v. *State ex rel. Jameson,* 80 S.D. 411, 125 N.W.2d 171 (1963); *State* v. *Sauter,* 48 S.D. 409, 205 N.W. 25 (1925). *Cf. Rosebud, supra* at 603-05; *DeCoteau, supra* at 449. As in *Rosebud,* the recent interruption of the "long-standing assumption of jurisdiction by the State" is unjustified. *Rosebud, supra* at 604-05.

It is clear from the foregoing discussion that the decision below is directly at odds with this Court's decisions in *Rosebud* and *DeCoteau.* This conflict can only serve to undermine the principles and rulings set forth in those cases. In fact, the failure of the court below to confront the directly applicable holdings in *Rosebud* amounts to an implicit rejection of that decision. This is reflected in the majority opinion below, in which the court states:

> Simply stated, South Dakota has, at times, asserted criminal jurisdiction over *this and other reservations* and, at times, it has not. We acquiesced in this exercise until Judge Stephenson carefully examined the matter in [*Condon*] in 1973, and Judge Bright reexamined it in [*United States* v. *Long Elk,* 565 F.2d 1032 (8th Cir.)] in 1977.... *We adhere to their decisions and to our opinion in* [*City of New Town* v. *United States,* 454 F.2d 121 (8th Cir. 1972)].

612 F.2d at 323 (emphasis added). Since *Long Elk* and *New Town* concerned surplus land acts not involved in this case, the above passage must be read as a general statement of the court's view of the state of the law regarding the disestablishment of historic reservation areas opened by surplus land statutes. Since no mention is made of this Court's decisions in *Rosebud* and *DeCoteau,*

or, for that matter, of the Eighth Circuit's own decisions in *Rosebud* and *Cook,* the implication of the passage is that the Court of Appeals believes those cases to be wrongly decided.[11] Therefore, it is important that the decision below be reviewed, not merely to correct a result contrary to manifest congressional intent, but to reaffirm the validity of the principles expressed by this Court.

III. THE DECISION OF THE COURT BELOW IS ONE IN A SERIES OF DECISIONS WHICH REFLECT AN INCONSISTENT APPLICATION OF THE PRINCIPLES EXPRESSED BY THIS COURT AND WHICH UNDERMINE THOSE PRINCIPLES.

The Eighth Circuit has in the past decade decided a number of cases involving the effect of surplus land acts of Congress on reservation boundaries. *See Red Lake Band of Chippewa Indians* v. *Minnesota,* No. 79-1420 (8th Cir., January 31, 1980); *United States* v. *Dupris,* 612 F.2d 319 (1979); *United States* v. *Long Elk,* 565 F.2d 1032 (8th Cir. 1977); *United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120 (8th Cir. 1975); *cert. denied,* 430 U.S. 982 (1977); *Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87 (8th Cir. 1975), *aff'd,* 430 U.S. 584 (1977); *United States ex rel. Feather* v. *Erickson,* 489 F.2d 99 (8th Cir. 1973), *rev'd sub nom. DeCoteau* v. *District County Court,* 420 U.S. 425 (1975); *United States ex rel. Condon* v. *Erickson,* 478 F.2d 684 (8th Cir. 1973); *City of New Town* v. *United States,* 454 F.2d 121 (8th Cir. 1972). Despite the recent definitive decisions of this Court in *Rosebud* and *DeCoteau,* no consistent application of the principles enu-

[11] It should be noted that the suggestion that *Rosebud* is incorrect is inherent in the historical argument made by the United States before the District Court. *United States* v. *A Juvenile,* 453 F.Supp. at 1175-76.

merated by this Court has emerged. The decisions of the Eighth Circuit since *Rosebud* and *DeCoteau* cannot be reconciled, and some, including that in the instant case, directly conflict with the decisions of this Court. The inconsistency inherent in this line of decisions not only creates undue confusion as to the applicable rules of law, but threatens the continuing vitality of the decisions of this Court.

After the 1962 decision of this Court in *Seymour* v. *Superintendent*, 368 U.S. 351, the Eighth Circuit, relying on its interpretation of *Seymour*, held in three instances that Indian reservations or portions thereof had not been disestablished by the acts of Congress at issue. *See United States ex rel. Feather* v. *Erickson, supra; United States ex rel. Condon* v. *Erickson, supra; City of New Town* v. *United States, supra.* This trend was halted with the reversal by this Court, in *DeCoteau*, of the *Feather* decision. The two cases decided by the Eighth Circuit following *DeCoteau*, which, as noted above, involved statutes virtually identical to the 1908 Cheyenne River Act, resulted in a finding of congressional intent to diminish the reservations involved. *See United States ex rel. Cook* v. *Parkinson, supra; Rosebud Sioux Tribe* v. *Kneip, supra.* Since this Court's decision in *Rosebud*, however, the Eighth Circuit's decisions have taken a sharply different course. The court's 1977 decision in *United States* v. *Long Elk, supra*, involving a 1913 statute much like those considered in *Rosebud* and the 1908 Act in dispute here, arrived at a conclusion opposite to that reached in *Rosebud*, relying in part on the earlier decision in *Condon*. A similar result was reached in the instant case.

Nowhere is this conflict of decisions more evident than in the judicial treatment of the 1908 Cheyenne River Act. In *United States* v. *LaPlant*, 200 F. 92 (D.S.D. 1911), the District Court held that the 1908 Act had the effect of diminishing the reservation boundaries by excluding the area opened to settlement. This continued as the state of the law for over sixty years, as is indicated in the decisions of the South Dakota Supreme Court. *See, e.g., State* v. *Barnes*, 81 S.D. 511, 137 N.W.2d 683 (1965); *Lafferty* v. *State ex rel. Jameson*, 80 S.D. 411, 125 N.W.2d 171 (1963); *State* v. *Sauter*, 48 S.D. 409, 205 N.W. 25 (1925). *See also United States* v. *Dewey County*, 14 F.2d 784, 785 (D.S.D. 1926), *aff'd on other grounds*, 26 F.2d 434 (8th Cir.), *cert. denied*, 278 U.S. 649 (1928); *United States* v. *Pearson*, 231 F. 270, 271 (D.S.D. 1916). In 1970, the suggestion that the reservation remained intact after the 1908 Act was made in a dissent from the Eighth Circuit's opinion in *United States ex rel. Miner* v. *Erickson*, 428 F.2d 623, 627 n.11 (8th Cir. 1970) (Lay, J., dissenting). In 1973, this argument was accepted in *United States ex rel. Condon* v. *Erickson, supra*, and *LaPlant* was overruled. Subsequently, in light of the intervening decisions of this Court in *DeCoteau* and *Rosebud*, the question was reexamined by the South Dakota Supreme Court in *Stankey* v. *Waddell*, 88 S.D. 104, 256 N.W.2d 117 (1977). The court in *Stankey*, relying on the decisions in *Rosebud*, found that the 1908 Act had the effect of disestablishing the opened portion of the original reservation. Two years later, however, the Eighth Circuit in the instant case reaffirmed *Condon*, thus tacitly rejecting the ruling in *Stankey*.

The uncertainty regarding the proper application of the guidelines articulated by this Court is clearly evident from the above discussion. The conflicting decisions in the Eighth Circuit demonstrate that this uncertainty persists despite the decisions of this Court in *Rosebud* and *DeCoteau*, and the state of law concerning the important

jurisdictional issues involved remains unsettled. This situation, as evidenced by the opinion below, erodes the principles and guidelines enunciated in *Rosebud* and *DeCoteau*, and it therefore requires authoritative resolution by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The matter should be scheduled for argument on the merits, or, in the alternative, be remanded to the Court of Appeals for further consideration in light of *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). *See Appawora* v. *Brough*, 431 U.S. 901 (1977) (case involving similar issue remanded for consideration in light of *Rosebud*).

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